EDITOR'S NOTE

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(13)

No. 86-656-CFX
Status: GRANTED

Title: Ronald W. Reagan, et al., Petitioners
v.
James Abourezk, et al.

Docketed:
October 20, 1986

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Shapiro, Steven R.

Entry	Date	Note	Proceedings and Orders
1	Aug 11 1986		Application for extension of time to file petition and order granting same until September 20, 1986 (White, August 13, 1986).
2	Sep 10 1986		Application for further extension of time to file petition and order granting same until October 20, 1986 (Chief Justice, September 16, 1986).
3	Oct 20 1986	G	Petition for writ of certiorari filed.
4	Nov 22 1986		Brief of respondents James Abourezk, et al. in opposition filed.
5	Nov 25 1986		DISTRIBUTED. December 12, 1986
6	Dec 15 1986		Petition GRANTED. Justice Scalia OUT.
			**********
8	Jan 28 1987		Order extending time to file brief of petitioner on the merits until February 28, 1987.
9	Feb 26 1987		Joint appendix filed.
10	Feb 27 1987		Brief of petitioners Ronald W. Reagan, et al. filed.
11	Feb 27 1987		Brief amicus curiae of Washington Legal Foundation, et al. filed.
14	Mar 4 1987		Record filed.
15	Mar 4 1987		Certified copy of original record and proceedings, 1 box, received.
16	Apr 2 1987		Brief amicus curiae of American Assn. of University Professors, et al. filed.
17	Apr 2 1987		Brief amicus curiae of Comm. on Immigration and Nationality Law, et al. filed.
18	Apr 3 1987		Brief amicus curiae of Lawyers Comm. for Human Rights, et al. filed.
19	May 4 1987		Lodging received.
20	Apr 3 1987		Brief amicus curiae of American Bar Association filed.
21	Apr 3 1987		Brief amicus curiae of International Human Rights Law Group filed.
22	Apr 2 1987		Brief of respondents James Abourezk, et al. filed.
23	Jul 17 1987		CIRCULATED.
24	Jul 20 1987		SET FOR ARGUMENT. Monday, October 5, 1987. (3rd case).
25	Sep 25 1987	X	Reply brief of petitioners Ronald W. Reagan, et al. filed.
26	Oct 5 1987		ARGUED.

86-656 (1)
No.

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, ET AL., PETITIONERS

v.

JAMES ABOUREZK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

BRUCE CRONIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1182(a)(27) permits denial of a visa to an alien only if his activities—and not just his presence or entry—would be prejudicial to the public interest.

2. Whether 8 U.S.C. 1182(a)(27) permits denial of a visa to an alien based on foreign policy concerns only if those concerns are independent of—and not merely in addition to—the alien's affiliation with organizations listed in 8 U.S.C. 1182(a)(28).

PARTIES TO THE PROCEEDING

Petitioners in *Reagan* v. *Abourezk* are Ronald Wilson Reagan, George P. Shultz, William French Smith, and Alan C. Nelson; petitioners in *Shultz* v. *City of New York* and *Cronin* v. *Shultz* are George P. Shultz, William French Smith, and Alan C. Nelson. The respondents in *Reagan* v. *Abourezk* are James Abourezk, Douglas Cassel, Jr., John Coatsworth, Rev. Harvey Cox, Don Edwards (individually and as a Member of the House of Representatives), Sidney Lens, George Overton, Richard Parker, Charles E. Schumer (individually and as a Member of the House of Representatives), James M. Shannon (individually and as a Member of the House of Representatives), Paul Tsongas (individually and as a Member of the House of Representatives), Mortimer B. Zuckerman, the Chicago Lawyer, Ltd., The Chicago Religious Task Force on Central America, First Parish Church of Concord, Massachusetts, Institute for Policy Studies, Unitarian Universalist Service Committee, Washington Office on Latin America, Dr. Dana McLean Greeley, and Phillippe Villers; the respondents in *City of New York* v. *Shultz* are the City of New York, Edna Acosta-Belen, Chai Feldblum, Jill Gay, Thomas H. Holloway, Sally McConnell-Ginet, Barbara Corrado Pope, David S. Rudstein, Mary Kay Vaughan, Committee on Religion, Ethics and Social Policy, Committee on U.S.-Latin American Studies, Institute for Policy Studies, and the New College of California; respondents in *Cronin* v. *Shultz* are Bruce Cronin, Judith Freiwirth, Anthony Palomba, Mobilization for Survival, Boston Mobilization for Survival, and New England Campaign to Stop the Euromissiles.

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In the Supreme Court of the United States

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No.

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CITY OF NEW YORK, ET AL.

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v.

BRUCE CRONIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of State and all other petitioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-64a) is reported at 785 F.2d 1043. The opinion of the district court (App., *infra*, 65a-80a) is reported at 592 F. Supp. 880.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 82a-83a) was entered on March 11, 1986. A petition for rehearing and a suggestion for rehearing en banc were denied on May 23, 1986 (App., *infra*, 84a, 85a). On August 13, 1986, Justice White extended the time for filing a petition for a writ of certiorari to September 20, 1986. On September 16, 1986, Chief Justice Burger further extended the time for filing to and including October 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. 1182 provides in relevant part:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;
>
> (28) Aliens who are, or at any time have been, members of any of the following classes:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political

or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt * * *.

* * * * *

22 U.S.C. 2691 provides:

(a) For purposes of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for purposes of encouraging other signatory countries to comply with those provisions, the Secretary of State should, within 30 days of receiving an application for a nonimmigrant visa by an alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such alien, unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate. Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization.

(b) This section does not apply to representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state.

(c) This section does not apply with respect to any alien who is a member, official, representative, or spokesman of the Palestine Liberation Organization.

(d) The Secretary of State may refuse to recommend a waiver for aliens from signatory countries which are not in substantial compliance with the provisions of the Helsinki Final Act, particularly the human rights and humanitarian affairs provisions.

STATEMENT

1. a. The terms and conditions under which aliens may enter the United States, as visitors or as immigrants, are set forth in the Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. II) 1101 *et seq.* (Immigration Act or Act). The Act is administered jointly by the Attorney General, the Secretary of State, and United States consular officers abroad. 8 U.S.C. 1103, 1104.

With exceptions not relevant here, no alien may be admitted to the United States without first having applied for and obtained an immigrant or nonimmigrant visa. See 8 U.S.C. 1181(a), 1182(a)(26). Nonimmigrant visas are issued to aliens seeking entry into the United States for one or more of the purposes specified in 8 U.S.C. 1101(a)(15). The authority to grant or deny such visas is assigned to consular officers (8 U.S.C. 1201, 1202), and no visa may be issued if the consular officer "knows or has reason to believe" that the applicant is ineligible to receive a visa under the Act (8 U.S.C. 1201(g)).[1]

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[1] The alien has "the burden of proof * * * to establish that he is eligible to receive such visa * * * or is not subject to exclusion under any provision of [the Act]." 8 U.S.C. 1361. Any alien may apply or reapply for a visa at any time, and each visa application is given independent consideration by the consular officer on the basis of the facts and circumstances known at the time of the particular application. See 22 C.F.R. 41.90.

Section 1182(a) of the Act lists 33 separate categories of aliens who "shall be ineligible to receive visas and shall be excluded from admission into the United States." Two categories are at issue in this case, 8 U.S.C. 1182(a)(27) (Subsection 27) and 8 U.S.C. 1182(a)(28) (Subsection 28). Subsection 27 applies to "[a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Subsection 28 applies, inter alia, to aliens who are, or at any time have been, "members of or affiliated with * * * the Communist or any other totalitarian party * * * of any foreign state, [or] * * * any * * * affiliate * * * of any such * * * party."

Under 8 U.S.C. 1182(d)(3)(A), aliens falling into 30 of the 33 categories contained in Section 1182(a) may, in certain circumstances, still be granted a visa. A visa may issue to such aliens if, inter alia, the Secretary of State or consular officer recommends that a visa be granted, and the Attorney General, in his discretion, approves the recommendation. Subsection 28 is one of the categories subject to this waiver of ineligibility; Subsection 27 is one of the three categories that is not.

Certain standards for the Secretary of State's determination whether to recommend a waiver to the Attorney General under Section 1182(d)(3)(A) for aliens otherwise excludible under Subsection 28 are prescribed by 22 U.S.C. 2691, commonly known as the McGovern Amendment. The Amendment provides that the Secretary "should" make such a waiver recommendation in the case of "any alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization," unless the Secretary certifies to Congress that "the admission of such alien would be contrary to the

security interests of the United States." 22 U.S.C. 2691(a). The Amendment provides, however, that it does not authorize or require "the admission * * * of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization." *Ibid.*

b. Applications for nonimmigrant visas do not typically raise foreign policy concerns.[2] In certain cases, however, the decision whether to grant or deny a visa has significant diplomatic consequences. As explained in the affidavit of then-Under Secretary of State for Political Affairs Lawrence S. Eagleburger (C.A. App. A137):[3]

> The overwhelming majority of NIV [nonimmigrant visa] applications involve only the ordinary circumstances of aliens seeking to visit the United States for

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[2] According to an affidavit filed in the district court in March 1984, for the preceding 20-year period in which the State Department had kept such statistics (1963-1983), consular officers issued nearly 70 million nonimmigrant visas, and denied (on foreign policy *or* internal security grounds) only 519 applications for such visas under Subsection 27 (C.A. App. A161). During the most recent period, from 1981 through 1983, six to seven million nonimmigrant visas had been granted annually, and an average of less than 30 were denied under Subsection 27 (*ibid.*). These figures are also found in the Statement of Joan Clark, Assistant Secretary of State for Consular Affairs, Department of State, *Exclusion and Deportation Amendments: Hearings on H.R. 4509 and H.R. 5227 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 90 (1984); and Dep't of State, Bureau of Consular Affairs, *Reports of the Visa Office* (FY–1980, 1981, 1982).

[3] In the district court, in support of its motion to dismiss or, in the alternative, for summary judgment, the government submitted one public affidavit of Under Secretary Eagleburger (C.A. App. A135-A152) and two public affidavits of Deputy Assistant Secretary of State Louis P. Goelz (*id.* at A153-A167, A304-A308). The government also filed three classified affidavits from Under Secretary

reasons of business or pleasure. However, in some instances, the issuance, denial or revocation of a NIV to a particular alien can have significant diplomatic or foreign policy ramifications to the extent that the issuance or denial is construed as an act of the United States Government. Thus, for example, the issuance or denial of a visa to a foreign government official may be taken by the alien's government as a reflection of United States foreign policy vis-a-vis that government and may result in reciprocal action or retaliation by that government. Similarly, the denial of visas to foreign government officials is one of the tools available to a government to communicate its attitude about the policies of other states.

For these reasons, the Department of State provides special guidance to its consular officers whenever visa applications raise national security or foreign policy concerns. In such cases, agency guidelines require consular officers to refer the case to the Department for an advisory opinion prior to the issuance or refusal of a visa. Advisory opinions are particularly required when a consular officer has reason to believe that an applicant may be ineligible under Subsection 27. See C.A. App. A137-A140; 9 Dep't of State, Foreign Affairs Manual, Pt. II, § 41.91(a)(27) (1975). The Department renders an advisory opinion "only after a thorough review of the information available to

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Eagleburger, which were submitted for the district court's in camera inspection (App., *infra*, 86a-94a). These classified affidavits were also submitted in camera to the court of appeals.

Following the remand of these cases from the court of appeals, the government determined that the passage of time would permit declassification of nearly all of the in camera affidavits. Only one paragraph and part of one sentence in one of the affidavits (see App., *infra*, 92a, 94a) remain classified. The affidavits, as declassified, have been provided to respondents.

the Department and the recommendations of those officers responsible for the geographic and policy areas affected" (C.A. App. A140). Only the Assistant Secretary of State for Consular Affairs or a superior officer may issue an opinion advising against issuance of a visa on foreign policy grounds (*id.* at A161). In sensitive cases, the Secretary of State or his immediate designee (such as the Under Secretary of State for Political Affairs) may make the determination (*ibid.*).

2. Tomas Borge, Olga Finlay, Leonor Rodriguez Lezcano, and Nino Pasti applied for nonimmigrant visas to meet and talk with American citizens who had invited them to come to the United States. Based on advisory opinions from the Department of State, consular officers denied each application under Subsection 27.

a. Tomas Borge was invited by the plaintiffs in *Abourezk* v. *Reagan*.[4] Borge is the Interior Minister of Nicaragua, and one of the highest ranking and most influential members of the Sandinista Front for National Liberation, the ruling body of Nicaragua (App., *infra*, 86a; C.A. App. A162). In November 1983, the Nicaraguan government submitted a diplomatic note to the United States Embassy in Managua, Nicaragua, requesting that Borge be issued a nonimmigrant visa for a five-day visit to the United States (C.A. App. A162-A163). The request was accompanied by a diplomatic passport that the Nicaraguan government had issued to Borge (App., *infra*, 86a-87a).

Under Secretary Eagleburger rendered an advisory opinion that Borge was ineligible for a visa under Subsection 27 because his admission would be "highly prejudicial

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[4] The plaintiffs in *Abourezk*—members of Congress, university professors, journalists, and religious leaders—invited Borge to the United States to discuss issues regarding Central America and Nicaragua. See App., *infra*, 5a, 66a; C.A. App. A18.

to the foreign policy interests of the United States" (App., *infra*, 88a). See also C.A. App. A141, A163. In making this judgment, Eagleburger concluded, inter alia, that Borge "intended to travel to the United States *in his official capacity*," and that his admission at that particular time would send "a very wrong message to our allies and adversaries alike concerning United States policies in Central America, and could have had a severely adverse impact on ongoing multilateral efforts by the United States to resolve the current conflict in that region" (App., *infra*, 86a-87a (emphasis in original)). Eagleburger further noted that a visit in October 1983 by the Foreign Minister of Nicaragua had "undercut * * * multilateral negotiations" (*id.* at 87a).

b. Olga Finlay and Leonor Rodriguez Lezcano were invited by the plaintiffs in *City of New York* v. *Shultz*.[5] Both are officials of the Communist Party of Cuba, and both are members of the Federation of Cuban Women, an organization which the Department of State has determined to be affiliated with and controlled by the Cuban Communist Party (App., *infra*, 89a; C.A. App. A164-A165). Finlay, in addition, is the Cuban representative to the United Nations Commission on the Status of Women (C.A. App. A164-A165). In September 1983, Finlay and Lezcano applied for 30-day, nonimmigrant visas to the United States. Their applications were accompanied by diplomatic passports, and were transmitted to the consular officer in Havana, Cuba, by diplomatic note. App., *infra*, 90a; C.A. App. A165.

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[5] The plaintiffs in *City of New York*—the New York City Commission on the Status of Women and several women's studies programs at various universities—invited Finlay and Lezcano to the United States to discuss issues concerning women. See App., *infra*, 6a, 67a; C.A. App. A33-A34.

The Assistant Secretary for Consular Affairs, in an advisory opinion ratified by Under Secretary Eagleburger, concluded that Finlay and Lezcano were ineligible for visas under Subsection 27, since their entry would prejudice the foreign affairs of the United States (C.A. App. A142-A143, A165-A166). In Eagleburger's view, both applicants "intended to travel to the United States not as private Cuban citizens, but rather as official representatives of the Cuban Government" (App., *infra*, 90a; see C.A. App. A142), and "[t]he official, governmental nature of their proposed trip was clearly manifested both by the issuance to the two women of Cuban diplomatic passports and by the submission of their applications through diplomatic channels" (C.A. App. A142). He determined that their entry would be inconsistent with our foreign policy toward Cuba, a policy which seeks to curb Cuban influence in Central and South America by denying to it "the aura of legitimacy which normal diplomatic relations with the United States would undoubtedly confer" (App., *infra*, 90a).

c. Nino Pasti was invited by the plaintiffs in *Cronin* v. *Shultz*.[6] Formerly a general in the Italian military and a member of the Italian Senate, Pasti is an active participant in the World Peace Council, an organization which the State Department has determined is "controlled and financed" by, and is an "instrumentality" of, the Soviet Union (App., *infra*, 92a; C.A. App. A163). In September 1983, Pasti applied to the American Embassy in Rome for a nonimmigrant visa (C.A. App. A163).

As in the other cases, Pasti's application was referred by the consular officer to the Department of State for an advisory opinion (C.A. App. A163-A164). The opinion, authored by the Assistant Secretary of State for Consular

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[6] The plaintiffs in *Cronin* are principally groups advocating nuclear disarmament. They invited Pasti to attend and speak at a rally in Boston. App., *infra*, 5a, 66a-67a; C.A. App. A47.

Affairs, concluded that Pasti was ineligible to receive a visa under Subsection 27, because his admission would prejudice the conduct of United States foreign policy (*id.* at A142, A164). In ratifying the opinion, Under Secretary Eagleburger noted that the World Peace Council is an instrument of Soviet efforts to disrupt American foreign policy; he emphasized that the timing of Pasti's proposed trip coincided with the "particularly delicate period" during the controversial "initial deployment of Cruise and Pershing II missiles in certain NATO countries" (App., *infra*, 92a-94a).

3. a. The individuals and groups who invited these four aliens each filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Columbia. Plaintiffs alleged that the government acted without statutory authority in denying the visas because: Subsection 27 does not authorize exclusion on the basis of foreign policy (as opposed to national security) concerns; Subsection 27 does not authorize the exclusion of an applicant when it is his mere entry or presence (as opposed to the specific activities in which he intends to engage) that will be prejudicial to the public interest; and the government's interpretation of Subsection 27 is contrary to the McGovern Amendment, 22 U.S.C. 2691. Plaintiffs also complained that the visa denials in these cases violated their First Amendment rights to associate with their invitees and listen to them in this country. App., *infra*, 14a; C.A. App. A16-A58.

The district court entered summary judgment for the government (App., *infra*, 81a). Judge Greene rejected each of plaintiffs' statutory arguments, concluding that the government's actions were fully within the ambit of Subsection 27 (App., *infra*, 72a-75a). The court further held that under *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the facially legitimate and bona fide reasons ad-

vanced by the government in support of its actions defeated plaintiffs' First Amendment claims (App., *infra*, 75a-80a).

b. On appeal, a divided panel vacated the district court's judgment and remanded for further proceedings (App., *infra*, 82a-83a). The court agreed with the government that Subsection 27 may properly be invoked to deny visas because of foreign policy concerns (*id.* at 14a-16a), but ruled against the government and remanded on two other statutory issues.[7]

It found, first, that the record was inadequate to decide whether Subsection 27 permits exclusion based only on concerns sparked by an alien's entry or presence in the United States (App., *infra*, 16a-22a). In reaching this conclusion, the court noted that the language of Subsection 27 refers only to an alien's expected "activities," not his presence or entry (*id.* at 16a). Nor, in the court's view, did the legislative history resolve the issue in the government's favor; instead, the court found that the history "is terse and tugs in more than one direction" (*id.* at 17a). Similarly, the court found that the evidence of administrative practice was too "meager" to give rise to a presumption of congressional acquiescence in the government's view that Subsection 27 applies to entry or presence (*id.* at 21a).[8] Nevertheless, believing that "[i]nformation about such acquiescence, or the absence of it, would rank as a signifi-

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[7] The court also rejected the government's threshold objections to judicial review: that the cases were moot, that plaintiffs lacked standing, and that the district court lacked subject matter jurisdiction (App., *infra*, 8a-13a).

[8] The court nevertheless found in the record "at least one instance, of which Congress was apprised," in which the State Department actually excluded an alien because of concerns about his mere presence in the United States (App., *infra*, 21a). The court also recognized that 9 Dep't of State, Foreign Affairs Manual, Pt. II, § 41.91 (a)(27)(1.4) (1975) gave as an example of an alien excludible under Subsection 27 one who engaged in physical brutality while in

cant indicator of the legislature's will" (*id.* at 18a), the court remanded for "fuller proceedings" on the nature of administrative practice under Subsection 27 (*id.* at 22a).

Second, the court ruled that the district court had improperly analyzed the relationship between Subsection 27 and Subsection 28 (App., *infra*, 22a-30a). The court held that the government may exclude aliens under Subsection 27 for foreign policy reasons only if those reasons are "*independent of*" and not merely "*in addition to*" the fact that the aliens are members of, or affiliated with, the communist and anarchist organizations listed in Subsection 28 (*id.* at 24a (emphasis in original)). Any other holding, the court reasoned, would "nullif[y]" the restrictions placed by the McGovern Amendment on the use of Subsection 28 (*id.* at 23a); for this point the court (*id.* at 23a-24a n.16) relied in part on a similar holding in *Allende* v. *Shultz*, 605 F.Supp. 1220 (D. Mass. 1985). In adopting this interpretation, the court recognized that affiliation with a hostile government may qualify as proper grounds for the denial of a visa under Subsection 27, but held that such affiliation may not be "presumed *because of* the applicant's membership or participation in a subsection (28) organization" (*id.* at 27a (emphasis in original)). The court therefore remanded for a determination as to whether governmental affiliation, independent of organizational affiliation, was "*the* reason" for the exclusions in these cases (*id.* at 27a-28a (emphasis in original)).

In view of its rulings on the statutory issues, the court declined to consider plaintiffs' constitutional claims (App., *infra*, 30a n.24).

c. Judge Bork dissented (App., *infra*, 34a-64a). He concluded that the majority's decision deprived the Executive "of much of the flexibility and nuance that are

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political power (App., *infra*, 19a-20a); the court acknowledged that this "example in the Manual may represent an open assertion of the power to exclude under subsection (27) on the basis of entry alone" (*id.* at 20a).

essential in the conduct of foreign relations" (*id.* at 60a), and began "a process of judicial incursion into the United States' conduct of its foreign affairs" (*id.* at 64a).

Judge Bork criticized the majority's analysis of the "mere entry/presence" issue (App., *infra*, 38a-47a). In his view, the legislative history of Subsection 27 and its statutory predecessors unambiguously settles the question. That history, he found, includes at least six occasions in which Congress clearly interpreted the term "activities" to "encompass[] entry and presence as well" (*id.* at 42a; see *id.* at 38a-42a). Furthermore, to the extent that the issue could be considered close, Judge Bork noted that under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the courts must defer to a reasonable administrative interpretation, especially in the foreign policy context (App., *infra*, 36a-38a, 43a). Applying the *Chevron* test, he found "it difficult to understand how an interpretation offered half a dozen times by Congress * * * can possibly be unreasonable when adopted by officials in the executive branch" (*id.* at 43a). Given the reasonableness of the Executive's view that Subsection 27 applies to mere presence or entry, Judge Bork found no need for evidence of congressional acquiescence, and thus no need for the majority's remand on this issue (id. at 44a-47a). Moreover, Judge Bork found that evidence supporting the government's position already existed in the record (*id.* at 44a-45a n.2).

Judge Bork also disagreed with the majority's interpretation of the McGovern Amendment and its analysis of the relationship between Subsections 27 and 28 (App., *infra*, 47a-60a). He thought it clear, based on the statute's language and legislative history, that Congress intended the restrictions in the Amendment to apply only "when the sole ground for exclusion is membership in an organization of the sort described [in Subsection 28]. When that membership raises additional concerns, as it does when it

involves a connection to a government that implicates American foreign policy, subsection (27) comes into play," and the McGovern Amendment does not apply (*id.* at 53a). Since in the present cases the Executive has "consistently cited" the aliens' affiliations with particular foreign governments as the basis for exclusion, Judge Bork concluded that the McGovern Amendment was inapposite (*id.* at 54a). Judge Bork emphasized that his interpretation fully serves the intent of the McGovern Amendment, since it would not justify the wholesale exclusion of all communists, but only those whose organizations are connected to foreign governments (*id.* at 55a-56a). Judge Bork wrote, for example, that "[i]t would seem entirely rational for the State Department to conclude that a member of the Communist Party of the Soviet Union was affiliated with the government of that nation but that a member of the Communist Party of the United Kingdom was not affiliated with the government of his country" (*id.* at 55a). On the other hand, he pointed out that the majority's interpretation leads to the anomalous result of "confer[ring] upon communists a favored entry status": members of non-Subsection 28 organizations may be excluded under Subsection 27 because their organizations are tied to hostile regimes, but members of Subsection 28 groups may not (*id.* at 56a). Further, Judge Bork noted that the majority's construction, although adopted to prevent the Executive from "evading" the McGovern Amendment, is "toothless"—and thus fails on its own rationale—for two reasons (*id.* at 57a-59a). First, because the Amendment states only that the Secretary of State "should"—not "shall"—recommend the admission of a member of a proscribed organization, "it is at least an open question whether the terms of the * * * Amendment are in fact mandatory" (*id.* at 57a). Second, even if the Secretary were obligated to render a favorable recommendation,

the Attorney General, under 8 U.S.C. 1182(d)(3), would have complete discretion not to accept it (App., *infra*, 58a-59a).

Having concluded that Subsection 27 thus authorized the exclusions in these cases, Judge Bork also addressed plaintiffs' First Amendment argument. He found this argument "obviously" without force under *Kleindienst* v. *Mandel*, *supra*, and other "clear and consistent" Supreme Court precedent (App., *infra*, 60a, 63a). Judge Bork pointed out that the aliens here were not denied visas because of the content of their political beliefs, but because they "are members of or connected with particular foreign governments" (*id.* at 62a). Judge Bork also rejected plaintiffs' argument that the discretion delegated to the Executive under Subsection 27 is so broad that it violates separation of powers principles; he found the challenge insubstantial under the many rulings by this Court upholding the constitutionality of "broad and discretionary Executive power" (*id.* at 63a).

d. The government petitioned the court of appeals to rehear these cases en banc. Of the court's eleven judges, five voted in favor of granting the petition, four voted against, and two did not participate in the vote. Accordingly, the petition was denied. App., *infra*, 85a.

REASONS FOR GRANTING THE PETITION

These cases raise important questions about the authority of the Executive to deny visas on foreign policy grounds and, more generally, about the proper scope of judicial review of Executive foreign policy judgments. In remanding for more evidence on the government's practice of excluding aliens because of harm that might result from their mere entry or presence, the court of appeals has erroneously failed to defer to the Executive's reasonable interpretation of the governing statute, and has set the stage for further proceedings that would improperly intrude into

sensitive matters of foreign policy. Moreover, in extending the McGovern Amendment to narrow the government's ability to exclude aliens affiliated with hostile regimes, the court of appeals has contravened congressional intent and again overturned the reasoned view of the Executive.

In both instances, the panel has established a precedent that greatly weakens an important tool of foreign policy. Further, by demanding additional fact-finding regarding the exclusion orders in these—and future—cases, the court of appeals has opened the door to inquiry into an area which this Court has carefully safeguarded from judicial interference. Ever since *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889), the "[c]ourts have * * * recognized the power to * * * exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control" (*Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953)). If the court of appeals' intrusion into this area is allowed to stand, it will not only enmesh the courts in questions outside the bounds of judicial competence, it will cast a chill over Executive decisionmaking and impair the conduct of foreign policy.

These results cannot be excused by a desire to avoid the constitutional issues in these cases. "[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." *Heckler* v. *Mathews*, 465 U.S. 728, 741-742 (1984) (quotation marks omitted). This principle applies with special force here, where the constitutional challenge is clearly foreclosed by *Kleindienst* v. *Mandel*, *supra*. As both Judge Greene and Judge Bork recognized, there can be no doubt that the foreign policy concerns raised by the visa applicants' affiliations with

hostile foreign governments constitute "facially legitimate and bona fide reason[s]" (*Kleindienst,* 408 U.S. at 770) for their exclusions.

1.a. In refusing to resolve the "mere entry/presence" issue on the record before it, the court of appeals failed to "give effect to the unambiguously expressed intent of Congress" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. at 843 (footnote omitted)), as evidenced by the statutory language, structure, and history.

The concern of Subsection 27 is whether an alien's "activities" cause prejudice to the "public interest" or "endanger the welfare, safety or security of the United States." Since any alien admitted to this country must engage in some activity, "the distinction between an alien's activities and his presence" is, as the district court noted, "one without a difference" (App., *infra,* 72a-73a). Furthermore, as a matter of common sense, "it would be surprising if Congress meant to bar aliens who would engage in prejudicial activities, but admit those whose very entry would be prejudicial to the public interest" (*id.* at 40a (Bork, J.).[9]

In sharp contrast, Subsection 29, 8 U.S.C. 1182(a)(29), requires denial of visas to aliens who "*after entry*" would engage in certain proscribed conduct, including "espionage, sabotage, public disorder, or * * * other activity subversive to the national security" (emphasis added). An interpretation that would also limit Subsection 27 to such activities would render it duplicative of Subsection 29—a

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[9] Indeed, recent history amply demonstrates that the distinction between entry and activity is basically irrelevant to the statutory purpose. As the district court observed, "[t]he mere entry of the Shah [of Iran] into the United States and his presence in this country had the most serious consequences for the United States, including the seizure of American hostages in Teheran and all that flowed from that episode" (App., *infra,* 73a).

result that would "offend[] the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect" (*Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) (citations omitted)).

Moreover, as exhaustively set forth in Judge Bork's dissent (App., *infra*, 38a-42a), the legislative history on this issue is decisive. Subsection 27 was taken almost verbatim from Section 22 of the Internal Security Act of 1950, ch. 1024, 64 Stat. 1006.[10] The Senate Report accompanying the 1950 Act stated that existing law in this area—which Section 22 was intended to "*broaden*[]"—already excluded aliens "whose *entry* would be prejudicial to the public interest or would endanger the safety of the United States" (S. Rep. 2230, 81st Cong., 2d Sess. 5 (1950) (emphasis added)). Section 22, in turn, was itself derived from a bill enacted in 1941 (55 Stat. 252) and described in its accompanying Senate Report as having the purpose "of keeping out of this country certain aliens, otherwise admissible, whose *presence* in the United States would be dangerous to the public safety" (S. Rep. 386, 77th Cong., 1st Sess. 1 (1941) (emphasis added)). The chief sponsor of this bill explained that it "merely permits the consuls to refuse visas to aliens whom they know or have reason to believe are persons whose *presence* in the United States will be inimical to the public interest" (87 Cong. Rec. 4757 (1941) (emphasis added; remarks of Senator Russell)).[11]

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[10] Both the House and Senate reports stated that Subsection 27 merely "incorporate[s]" Section 22 of the Internal Security Act of 1950. S. Rep. 1137, 82d Cong., 2d Sess. 10 (1952); H.R. Rep. 1365, 82d Cong., 2d Sess. 30, 49 (1952).

[11] Judge Bork's dissent cites three other examples from the legislative history which also demonstrate that Congress was concerned with an alien's presence, not just his likely activities after entry. App., *infra*, 40a-42a.

Against this legislative backdrop, the court of appeals nevertheless concluded that the legislative history "tugs in more than one direction" (App., *infra,* 17a). Yet, the only opposing pull cited by the court is a reference to prejudicial "activities" in the Conference Report accompanying the 1950 Act. See App., *infra,* 17a n.10, quoting H.R. Conf. Rep. 3112, 81st Cong., 2d Sess. 54 (1950). And, as explained by Judge Bork (App., *infra,* 42a), that discussion merely repeats verbatim the words of Section 22 and does not purport to explain what those words mean.

Finally, even if a common sense reading of the statute and its legislative history are not deemed to resolve the "mere entry/presence" issue, the court of appeals cited no evidence—and there is none—that suggests that the State Department's resolution of the issue is impermissible or unreasonable. As the agency charged with issuing visas under the Immigration Act, therefore, the State Department's resolution warrants judicial deference. *Chevron,* 467 U.S. at 842-845. Indeed, the demand for deference is heightened here because the question at issue implicates "the conduct of foreign relations" which is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" (*Harisiades* v. *Shaughnessy,* 342 U.S. 580, 589 (19[illegible] (footnote omitted)). See *Regan* v. *Wald,* 468 U.S. 222, 242 (1984) (discussing the "classical deference to the political branches in matters of foreign policy"). The authority to exclude aliens is "inherent in sovereignty" (*Kleindienst* v. *Mandel,* 408 U.S. at 765 (quotation marks omitted)) and "intricately interwoven" with the conduct of foreign policy (*Harisiades* v. *Shaughnessy,* 342 U.S. at 588). This authority "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation" (*Knauff* v. *Shaughnessy,* 338 U.S. 537, 542

(1950) (citations omitted)). The courts should, therefore, "hesitate long before limiting or embarrassing such powers" (*MacKenzie* v. *Hare*, 239 U.S. 299, 311 (1915)).[12]

b. The court of appeals' approach to the McGovern Amendment is equally flawed. In order to prevent "evasion" of the Amendment, the court would require the government to process visa applicants under Subsection 28, rather than Subsection 27, unless the reason for exclusion is not only *in addition to*, but *independent of*, the fact of membership in a Subsection 28 organization. Yet the court cites nothing in the text or legislative history of the Amendment to justify this severe limitation on use of Subsection 27. The evidence, in fact, is just the opposite.

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[12] Even if evidence of administrative practice were needed to decide the "mere entry/presence" issue, such evidence may be found without any remand. As discussed earlier (page 14), Judge Bork noted evidence already in the record supporting the government's position. Although the court of appeals relied on *Kent* v. *Dulles*, 357 U.S. 116 (1958), to find these examples inadequate (App., *infra*, 21a-22a), "[i]t would turn *Kent* on its head to say that simply because we have had only a few situations involving conduct such as that in the record, the Executive lacks the authority to deal with the problem when it is encountered." *Haig* v. *Agee*, 453 U.S. 280, 303 (1981) (footnote omitted). Finally, the Office of Legal Counsel of the Department of Justice (OLC) has noted that in 1968 the State Department excluded certain Rhodesians because of concerns not with "any specific activities in which they would engage here, but [with] the serious adverse foreign policy consequences of allowing them to be present in violation of Security Council Resolution 253" (1 Op. Off. Legal Counsel 64, 70 (1977)). Relying, inter alia, on a discussion of legislative history that parallelled Judge Bork's (*id.* at 71-72), OLC concluded there that the exclusion had been "based on a reasonable administrative interpretation of [Subsection 27]" (*id.* at 71), and accordingly endorsed a similar exclusion in 1977. See also 8 U.S.C. 1103(a) (vesting authoritative executive interpretation of the Act in the Attorney General). The Rhodesian incidents illustrate the consistency—and utility—from Administration to Administration of the interpretation of Subsection 27.

The McGovern Amendment, enacted in 1977, simply provides that "the Secretary of State should * * * recommend that the Attorney General grant" a waiver of Subsection 28 excludibility in order to allow temporary admission of an alien who would otherwise be denied a visa "by reason of" membership in a Subsection 28 organization. As explained by Judge Bork, the purpose of the Amendment was to put an end to "the statutorily-required blanket exclusion of virtually all people who were or had been affiliated in some way with [a Subsection 28] organization" (App., *infra,* 48a-49a). The Amendment, however, is narrowly circumscribed. It applies only to applicants who are "otherwise admissible," and was amended in 1978 to make clear that it does not apply to "any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization." As emphasized in the Conference Report discussing the Amendment, its provisions affect only those who are excludible "*solely* because of membership in or affiliation with a proscribed organization" (H.R. Conf. Rep. 95-537, 95th Cong., 1st Sess. 31 (1977) (emphasis added)).

The visa denials challenged in these cases clearly do not come within this narrow ambit. As noted by Judge Bork, the denials were based not on the aliens' memberships in proscribed organizations, but on their affiliations with foreign governments—governments whose relationships with the United States have been "marked with tension" (App., *infra,* 52a). Thus, as Under Secretary Eagleburger attested, Tomas Borge was excluded because he "intended to travel * * * *in his official capacity*" as one of the highest-ranking leaders of the Nicaraguan government (*id.* at 86a (emphasis in original)); Olga Finlay and Leonor Rodriguez Lezcano were excluded because they "intended to travel * * * not as private Cuban citizens, but rather as official representatives of the Cuban Government" (*id.* at 90a); and Nino Pasti was excluded because of his active

membership in the World Peace Council, an organization "controlled and financed by the USSR" (*id.* at 92a). And in each case the particularized foreign policy problems raised by their proposed visits were noted as well.[13]

The inapplicability of the McGovern Amendment to these cases is confirmed by the legislative history. In 1979, a provision was added to the Amendment to clarify that it does not apply to "representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state" (see 22 U.S.C. 2691(b)). A sponsor of this provision explained that it was designed to insure the exclusion of

> so-called leaders of purported labor unions in the Soviet Union and in other Communist countries of Eastern Europe who, whatever else they may be, cannot be considered genuine representatives of workers but are, rather, representatives of the State.

125 Cong. Rec. 8345 (1979) (remarks of Representative Solarz). As noted by Judge Bork (App., *infra,* 54a), while this provision specifically concerns only labor leaders, it reflects a broader understanding regarding the limits of the McGovern Amendment—namely, that representatives of foreign governments may be excluded notwithstanding their affiliation with Subsection 28 organizations.[14]

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[13] That the particular circumstances were considered and the exclusions not reflexively made is further demonstrated by the fact that, in earlier circumstances, three of the four aliens involved here had been granted admission (see App., *infra,* 28a).

[14] Significantly, the legislative history apparently offers only two examples of the kind of persons to whom the McGovern Amendment would apply: Eurocommunist leaders and communist labor leaders. See S. Rep. 95-194, 95th Cong., 1st Sess. 13 (1977). Neither are government representatives.

The court of appeals' holding would create anomalous results. As noted by Judge Bork (App., *infra,* 56a), the panel's decision confers a *favored* entry status on those who are members of Subsection 28 organizations, and requires the Executive to ignore an established affiliation between a given Subsection 28 organization and a particular foreign government. In the *Cronin* v. *Shultz* case, for example, the court has refused to permit the government to conclude that Nino Pasti is an undisclosed agent of the Soviet Union based on his membership in the World Peace Council. Yet, as already noted, the State Department has determined that the World Peace Council is an instrumentality of the Soviet Union. See page 10, *supra.* As one Department document concluded, the World Peace Council has a "preponderance of Soviet and pro-Soviet personnel in [its] key * * * leadership and decision-making positions"; "the bulk of its expenses are met by the Soviet Union"; and it "operate[s] however Soviet foreign policy interests dictate" (Dep't of State, *World Peace Council: Instrument of Soviet Foreign Policy*, Foreign Affairs Note (April 1982), *reprinted in* C.A. App. A145, A147, A148). There is simply no basis for the court of appeals' assumption that Congress intended in the McGovern Amendment to have the Executive close its eyes to such an alter ego relationship.[15]

In any event, the Executive's view that the McGovern Amendment permits it to take this relationship into account, for purposes of Subsection 27, is plainly not unreasonable, and is entitled to deference under *Chevron* and the other authorities discussed above (pages 20-21). Indeed, the government's construction of the Amendment is rooted in established administrative practice under the Immigration Act. It is not infrequent that, as here, the

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[15] The court of appeals apparently held that even its interpretation of the statutes was satisfied in the case of Tomas Borge (App., *infra,* 29a n.23).

facts of a case overlap two (or more) statutory grounds for exclusion or deportation, one of which contains a waiver provision such as the McGovern Amendment. This Court has held that the Executive's decision in such circumstances to proceed on the ground without the waiver is not—as the court of appeals suggests—an "evasion," but rather is fully consistent with statutory authority. See *Reid* v. *INS*, 420 U.S. 619 (1975); see also *Castro-Guerrero* v. *INS*, 515 F.2d 615 (5th Cir. 1975); *In re Diaz*, 15 I. & N. Dec. 488 (B.I.A. 1975).

2. It is vitally important that there be unambiguous recognition of the authority of the Department of State to exclude aliens whose presence or entry will impede its conduct of foreign affairs. As Under Secretary Eagleburger indicated (see pages 6-7, *supra*), Subsection 27 is used sparingly and, when it is used, it is because there are "significant diplomatic or foreign policy ramifications" at stake (C.A. App. A137). The Department of State should not be required to disregard the fact that the entry of a particular alien can have diplomatic repercussions, or the reality that some organizations are controlled by foreign governments.

Moreover, review by this Court is needed at the present stage of these cases because the court of appeals' decision manifests a troubling "process of judicial incursion into the United States' conduct of its foreign affairs" (App., *infra*, 64a (Bork, J., dissenting)). The ill effects of the decision will be felt both immediately and recurrently. The immediate effect, of course, will be an inappropriate and seriously intrusive remand, where the district court is to inquire into the circumstances of prior instances of Subsection 27's use, and into whether the United States has adequately demonstrated in this case that its exclusion of the aliens at issue was for reasons independent of, and not merely in addition to, their membership in organiza-

tions affiliated with foreign governments.[16] On the "mere entry/activity" issue, the panel demands that the government "come forward with further examples of the exercise or assertion of power to exclude under subsection (27) on the basis of presence alone," and requires that plaintiffs be given "sufficient discovery to contest those examples and provide counter-examples" (*id.* at 21a-22a (footnote omitted)). On the McGovern Amendment issue, the court requires further analysis of whether the visa applicants "have governmental affiliations independent of their membership in subsection (28) organizations" (see, *e.g.*, *id.* at 29a n.23).

Plaintiffs have, indeed, already taken the court's remand on the administrative practice issue as an invitation to discover the rationale underlying prior Subsection 27 exclusions. For example, in one discovery request, plaintiffs ask the Department of State to "describe the facts which formed the basis" for "every instance from January 1, 1970 to the present in which a visa was denied pursuant to" Subsection 27. Plaintiffs' First Set of Interrogatories and Document Requests, para. 12(a).[17] See also, *e.g.*, C.A. App. A180 (para. 4 of Declaration of Charles S. Sims (plaintiffs' co-counsel), discussing the wide discovery needed). Presumably, because the court of appeals' order allows plaintiffs to "contest" the examples produced by the government, plaintiffs will claim that they are entitled to cross-examine government officials regarding the reasons behind each example offered—a result fundamentally inconsistent with the Executive's exclusive discretion in this area. Cf. App., *infra*, 54a-55a n.5 (Bork, J.) ("requiring

[16] It deserves emphasis that these intrusive proceedings on remand are required here under the panel's decision even though the district court had ruled to the contrary and five out of nine participating appellate judges voted to grant rehearing en banc.

[17] This discovery request was originally served on December 30, 1983, and was revived following the court of appeals' remand order. See C.A. App. A66.

the Executive to justify a pattern of visa grants and denials would force the Department of State either to discuss highly sensitive matters in a public forum or to forego its authority to deny many visas").

On the McGovern Amendment issue, plaintiffs are likely to seize upon the court of appeals' remand order as authority to dispute any government determination that the visa applicants (independent of their organizational ties) are affiliated with foreign states. Indeed, the court of appeals posed just such a dispute in the case of Leonor Rodriguez Lezcano. The court stated that it did "not now comprehend any basis for claiming that [Lezcano has] governmental affiliations independent of [her] membership in subsection (28) organizations" (App., *infra,* 29a n.23). The court's conclusion, however, cannot be reconciled with Under Secretary Eagleburger's finding that "[t]he official, governmental nature of [both Lezcano's and Olga Finlay's] proposed trip was clearly manifested both by the issuance to the two women of Cuban diplomatic passports and by the submission of their applications through diplomatic channels" (C.A. App. A142). By reviewing—and indeed rejecting—the Under Secretary's finding, the court of appeals engaged in an exercise which could not be "further outside the bounds of judicial competence, or more intrusive with respect to the conduct of foreign affairs" (App., *infra,* 52a n.4 (Bork, J.)).[18]

In short, the court of appeals' decision was quite wrong, it will create substantial problems for the government's conduct of foreign policy, and will necessitate unseemly inquiry into its decisionmaking in this area.

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[18] In *Kleindienst* v. *Mandel,* 408 U.S. at 770, this Court specifically instructed the courts not to "look behind" the "facially legitimate and bona fide reason[s]" offered by the Executive for exclusion of aliens. Such an inquiry would bring the judiciary into an area committed "exclusively [to] the political branches of government" (*id.* at 765 (quota-

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfuly submitted.

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tion marks omitted). Accord, *e.g.*, *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976); *Shaughnessy* v. *Mezei*, 345 U.S. at 210; *Harisiades* v. *Shaughnessy*, 342 U.S. at 589.

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5673

JAMES ABOUREZK, ET AL., APPELLANTS

v.

RONALD WILSON REAGAN,
PRESIDENT OF THE UNITED STATES, ET AL.

No. 84-5681

CITY OF NEW YORK, ET AL., APPELLANTS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.

No. 84-5708

BRUCE CRONIN, ET AL., APPELLANTS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 83-03739, 83-03741 and 83-03895)

Argued September 23, 1985

Decided March 11, 1986

Before: EDWARDS, GINSBURG, and BORK, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GINSBURG.

Dissenting Opinion filed by *Circuit Judge* BORK.

GINSBURG, *Circuit Judge*: This case concerns the scope of the authority Congress accorded to the Secretary of State under the Immigration and Nationality Act of 1952, § 182, 8 U.S.C. § 1182(a)(27) (1982), to deny non-immigrant visas to aliens who wish to visit this country in response to invitations from United States citizens and residents to attend meetings or address audiences here. The district court, granting the government's motion for summary judgment, held that the specific visa denials at issue were within the State Department's statutory and constitutional authority.

See Abourezk v. Reagan, 592 F.Supp. 880 (D.D.C. 1984). We conclude that the district court incorrectly analyzed the statutory construction issue, and that questions of material fact remain. Accordingly, we vacate the judgment of the district court and remand the case for further proceedings consistent with this opinion.

I.

We describe first the statutory complex and, next, the essential facts of the cases presented for review.

The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* (1982) (Immigration Act or Act), delegates responsibility for regulating the entry of aliens jointly to the Attorney General, the Secretary of State, and United States consular officials abroad. The Secretary of State has the authority to revoke visas, as well as the general responsibility to supervise the issuance of visas by consular officers. *See id.* at § 1104; Brief for Appellees at 4. Section 1182(a) of the Act defines the categories of aliens that the government may exclude from this country. Some of these categories deal with the status of the alien, *see, e.g.*, § 1182(a)(28) (aliens who are members of Communist or anarchist organizations); others concern the alien's activities, *see, e.g.*, § 1182(a)(29) (aliens likely to engage in subversion or espionage); while still others involve the procedural requirements for entry, *see, e.g.*, § 1182(a)(20) (aliens without valid visas and passports).

Subsection (27) of section 1182(a), the provision centrally at issue in this case, directs the exclusion of an alien if the Attorney General has reason to believe that the alien "seek[s] to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." Pursuant to State Department policy, when a consular officer abroad receives a visa request from an individual he believes may be ineligible under subsection (27) the officer forwards the

request to the State Department where the appropriate officials consider it and render binding advice. *See* 22 C.F.R. § 41.130(c) (1985); Brief for the Appellees at 6-9.[1] If the alien is found to be within the subsection (27) classification, his exclusion is mandatory.

Subsection (28) of section 1182(a) also bears importantly on this case and was inadequately evaluated by the district court. This subsection authorizes the exclusion, *inter alia*, of aliens who are, or at any time have been, "members of . . . the Communist Party of the United States, . . . the Communist . . . party . . . of any foreign state, or . . . any . . . affiliate . . . of any such . . . party." 8 U.S.C. § 1182(a)(28)(C) (1982). Unlike subsection (27), subsection (28) does not require the Secretary of State to exclude any alien who meets the stated criteria. If the Secretary recommends a waiver of ineligibility, then, in the discretion of the Attorney General, the alien may be admitted. *See* 8 U.S.C. § 1182(d)(3)(A) (1982).

The McGovern Amendment, 22 U.S.C. § 2691 (1982), addresses the Secretary's implementation of this waiver provision. The Amendment calls upon the Secretary to recommend "the approval necessary for the issuance of a visa" to "any alien who is excludable from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States," unless the Secretary certifies to the Congress that "the admission of such alien would be contrary to the security interests of the United States." *Id.* at § 2691(a).

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[1] Routine name checks are ordinarily made in these cases through United States intelligence agencies. The State Department has acknowledged that "no recommendations were received from the Department of Justice or any of its components" regarding the visa requests involved in this litigation. Affidavit of Lawrence S. Eagleburger, *reprinted in* Joint Appendix at 140-41 (affidavit also acknowledges that information supporting visa denials for foreign policy reasons often includes "data and analyses from the United States law enforcement and intelligence communities").

This appeal involves three actions consolidated in the district court; the actions contest the denial under subsection (27) of four visa requests. In *Abourezk v. Reagan*, No. 84-5673, the plaintiffs are a diverse group of United States citizens—including members of Congress, university professors, journalists, and religious leaders—who had invited Tomas Borge, the Interior Minister of Nicaragua, to speak to them in this country. *See* Brief of Plaintiffs-Appellants at 9-11. The Nicaraguan government applied to the United States Embassy in Managua for a non-immigrant visa for Borge. After obtaining an advisory opinion from the State Department, the consular officer informed Borge, in late November 1983, that his visa request had been denied pursuant to section 1182(a)(27) of the Immigration Act. *See* Brief for the Appellees at 9-11.

The plaintiffs in *Cronin v. Shultz*, No. 84-5708, are principally groups interested in nuclear disarmament who had invited Nino Pasti to attend and speak at a rally in Boston. Pasti is a former member of the Italian Senate and former general in the Italian armed forces; he is now a peace activist. *See* Brief of Plaintiffs-Appellants at 8. Pasti is also a participant in the World Peace Council, an organization which the State Department believes to be controlled by the Soviet Communist Party. *See World Peace Council: Instrument of Soviet Foreign Policy*, FOREIGN AFFAIRS NOTE (Department of State, April 1982), *reprinted in* Joint Appendix at 144-48. The consular officer in Rome found Pasti ineligible to receive a visa under subsection (28). The officer therefore requested an advisory opinion from the State Department on the possibility of a waiver. In response, the Department informed the officer that Pasti was ineligible under subsection (27). The consular officer thereupon notified Pasti, in mid-October 1983, that his visa request had been denied. *See* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 163-64.

In *City of New York v. Shultz*, No. 84-5681, the plaintiffs, the New York City Commission on the Status of Women and several women's studies programs at various universities, had extended speaking invitations to two Cuban women, Olga Finlay and Leonor Rodriguez Lezcano; these individuals have special expertise regarding the status of women and family law in Cuba. *See* Brief of Plaintiffs-Appellants at 13-14. According to the State Department, both women are members of the Federation of Cuban Women, an organization affiliated with the Communist Party of Cuba. *See* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 164-65. Visa applications for the two women were conveyed by diplomatic note from the Government of Cuba. The consular officer in Havana forwarded the visa requests to the State Department and was advised that Finlay and Lezcano were ineligible under subsection (27). He notified them, in early October 1983, that their visa requests had been denied. *See* brief for the Appellees at 12-13[2]

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[2] On October 4, 1985, acting pursuant to § 212(f) of the Immigration Act, 8 U.S.C. § 1182(f) (1982), President Reagan issued a proclamation suspending the entry into the United States of officers or employees of the Cuban government or the Cuban Communist Party. *See* Proclamation No. 5377, 50 Fed. Reg. 41329 (1985). If this Proclamation covers Finlay and Lezcano, the President's directive might constitute an independent intervening cause for future exclusions, and thus render the *City of New York* case moot. *See* Los Angeles v. Davis, 440 U.S. 625, 631 (1979). The current record, however, is inadequate to enable us to determine, dispositively, whether the October 4, 1985, Proclamation would bar the entry of these women. *Compare* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 164-65 (stating that Finlay is an official of the Cuban Communist Party and a member of the National Committee of the Federation of Cuban Women and Lezcano, an official of the Federation of Cuban Women), *with* Affidavit of Olga Finlay, *reprinted in* Joint Appendix at 216 (stating that the affiant is not a member of the Cuban Communist Party and that the Federation of Cuban Women is not an instrumentality of the Cuban government or the Communist Party) *and* Affidavit of Leonor Rodriguez Lezcano, *reprinted in* Joint Appendix at 245 (same). We decline to decide this mootness issue on the scant

The plaintiffs filed suit in the district court requesting injunctive and declaratory relief. They argued that the State Department's exclusion of the aliens invited by plaintiffs to speak here exceeded the Department's statutory authority under subsection (27) and violated the plaintiffs' first amendment right to engage in dialogue with these foreign individuals. The district court granted the defendants' request for a stay of discovery pending their filing of a motion for summary judgment. *See Abourezk v. Reagan*, No. 83-3739 (D.D.C. Feb. 8, 1984) (order granting motion for extension of time and protective order staying discovery). After consideration of both the public documents and three classified affidavits submitted by the government for the court's *in camera* inspection, the district judge granted the defendants' motion for summary judgment. The court held that the government's action was within its statutory authority and survived the very limited constitutional scrutiny appropriate in a case concerning the admission or exclusion of aliens. *See Abourezk v. Reagan*, 592 F.Supp. 880 (D.D.C. 1984).

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record before us. The same issues are raised by all three consolidated cases; a finding that *City of New York* has become moot would not relieve this court of the responsibility to decide those common issues. We therefore leave the question of the impact of the President's Proclamation to the district court on remand.

We note, however, that the issuance of this Proclamation provides support for one of the plaintiffs' arguments: even if the court were to find that subsection (27) cannot be applied to bar aliens whose mere entry would threaten United States foreign policy interests, the Executive would not be helpless in the face of such a threat. He may act pursuant to section 1182(f) to suspend or restrict "the entry of any aliens or any class of aliens" whose presence here he finds "would be detrimental to the best interests of the United States." The President's sweeping proclamation power thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a). *See* Brief of Plaintiffs-Appellants at 40-42. Thus, we need not reject, avoid, or augment the formulation Congress adopted in subsection (27) in order to preserve the President's potency in this area. *Cf.* Dissent at 4-5.

II.

The government raises several preliminary objections to the adjudication of these claims. The State Department suggests that the district court lacked jurisdiction over the subject matter, that the plaintiffs have no right to contest the visa denials on statutory grounds, and that the case is moot. We find these contentions insubstantial.

The district court had subject matter competence in the case under both its general federal question jurisdiction, *see* 28 U.S.C. § 1331 (1982), and its specific jurisdiction over claims arising under the Immigration and Nationality Act, *see* 8 U.S.C. § 1329 (1982). Section 1329 states that "[t]he district courts . . . shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter [of the Immigration Act]." Section 1182(a)(27) is part of the relevant subchapter. The courts have reasonably inferred from this broad grant of jurisdiction that "clear and convincing evidence" of a congressional intent to preclude judicial review is lacking. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (stating, as the general rule, presumption in favor of judicial review of final agency action, absent "clear and convincing evidence" of congressional intent to the contrary); *see, e.g., Karmali v. Immigration and Naturalization Service*, 707 F.2d 408, 409-10 (9th Cir. 1983) (interpreting § 1329 as grant of jurisdiction over Immigration Act claims); *Acosta v. Gaffney*, 558 F.2d 1153, 1156 (3d Cir. 1977) (same).

We further note, as did the district court, *see Abourezk*, 592 F.Supp. at 883 n.10, the Supreme Court's disposition on the merits in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). In that case, United States sponsors of a Belgian journalist objected to his exclusion under section 1182(a)(28). Presumably, had the Court harbored doubts concerning federal court subject matter jurisdiction in

Mandel, it would have raised the issue on its own motion. *See, e.g., Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

The government also argues that the plaintiffs' statutory pleas may not be entertained; this argument blends objections to plaintiffs' standing and to their ability to state a claim for relief (cause of action). The Immigration Act, we agree, does not itself endow plaintiffs with a right of action.[3] But the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1982) (APA), which complements statutes controlling agency behavior, does. Section 702 of that Act, as explained by the Supreme Court in *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 152-53 (1970), authorizes suit by persons who suffer "injury in fact" by reason of the challenged agency action and are "arguably within the zone of interests to be protected or regulated" under a relevant statute.[4]

Persons who are not materially affected by an agency's interpretation of the governing law may not successfully invoke the APA to achieve court review. *See, e.g., Capital Legal Foundatin v. Commodity Credit Corporation*, 711 F.2d 253, 259-60 (D.C. Cir. 1983). But the plaintiffs in

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[3] The Immigration Act and related regulations provide explicitly for the participation of United States family members or employers in visa applications by certain aliens to whom they are connected. *See* 8 U.S.C. §§ 1151-1154 (1982) (immediate relative petitions); 8 C.F.R. § 204 (1985) (same); 8 C.F.R. § 212.8 (1985) (employer petitions). The plaintiffs in this case, however, are neither family members nor employers of the aliens in question. Therefore, they have no right to participate in the administrative process, and no attendant claims for relief, by virtue of these provisions. Nor does any other provision of the Immigration Act explicitly or implicitly authorize the claims in suit. *See* Cort v. Ash, 422 U.S. 66, 78 (1975).

[4] Section 702 affords a right or review to "[a] person suffering a legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1972).

this case are hardly strangers to the matter at issue. Unquestionably, they are "aggrieved" by the State Department's resort to section 1182(a)(27) to keep out people they have invited to engage in open discourse with them within the United States. *See* Brief for the Appellees at 20 ("Refusing visas to their alien invitees undoubtedly inhibits plaintiffs' rights to communicate with these individuals in face-to-face discussions on American soil."). The plaintiffs are substantively interested in, and adversely affected by, the Department's interpretation of subsection (27) as it coexists with subsection (28). They are, as the district court observed, at least arguably within the zone regulated by the statute. *See Abourezk*, 592 F.Supp. at 884 n.10.[5] They therefore have a cognizable stake in the construction of subsections (27) and (28), a practical interest adequate under section 702 of the APA to secure judicial review of their pleas regarding those provisions. *Cf. Capital Legal Foundation*, 711 F.2d at 259-60 & n.17.

Section 701 of the APA states that "[t]his chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701 (1982). As discussed above, the Immigration Act, far from precluding review, affirmatively provides for it. *See supra* at 8-9.[6] Furthermore, the statute does not

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[5] The McGovern Amendment, *see supra* at 4-5, adds force to the position that plaintiffs suffered an injury that arguably falls within the zone of interests of the relevant law. *See infra* at 23-25.

[6] The government cites Block v. Community Nutrition Institute, 104 S. Ct. 2450, 2456 (1984), as support for the proposition that a history of judicial construction barring review and congressional acquiescence in that construction may override the general presumption favoring review. That proposition, while true, is irrelevant to this case. Unlike the statute in *Block*, the statute in this case explicitly provides for judicial review. *See Block*, 104 S. Ct. at 2457. To override the language of a statute, indirect evidence of congressional intent, such as acquiescence in judicial construction, must be strong. *Cf.*

commit to unguided agency discretion the decision to exclude an alien. The Supreme Court has recently interpreted the "committed to unfettered agency discretion" provision as applicable only "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 105 S. Ct. 1649, 1655 (1985). Under this interpretation, the Immigration Act emphatically did not commit the decision to exclude an alien to standardless agency discretion; the statute lists thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power. *See* 8 U.S.C. § 1182(a) (1982). The statutory language thus channels the Secretary of State's discretion and, under *Heckler v. Chaney*, the constraints Congress imposed are judicially enforceable.

In sum, the APA applies to the plaintiffs' challenges; that Act gives them a right of review extending to the statutory as well as the constitutional propriety of the

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Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intent to the contrary, [statutory] language must ordinarily be regarded as conclusive."). Moreover, the *Block* rule is inapplicable to this case because there exist no longstanding judicial practice of refusing to review claims like those raised here. *Cf. Block*, 104 S. Ct. at 2454-56 (holding that statute precludes judicial review of consumers' claims although it allows review of milk handlers' claims). This case involves claims by United States citizens rather than by aliens, unlike Karmali v. Immigration and Naturalization Service, 707 F.2d 408 (9th Cir. 1983); claims concerning the decisions of State Department officials rather than consular officers abroad, unlike Castaneda-Gonzalez v. Immigration and Naturalization Service, 564 F.2d 417, 428 n.25 (D.C. Cir. 1977); and statutory claims that are accompanied by constitutional ones. The defendants have not produced a single case, and the court is aware of none, in which this kind of claim was found to be outside the province of the federal courts. On the contrary, in a case specifically addressing this type of claim, the Third Circuit found that the APA applied and the court reviewed the merits of the claim. *See* Acosta v. Gaffney, 558 F.2d 1153, 1156 (3d Cir. 1977).

State Department's application of section 1182(a)(27) to exclude the aliens invited by plaintiffs to the United States as speakers and meeting participants. We add, finally, that in the special circumstances of this case, the court has an independent obligation to consider questions of statutory construction. We should so proceed in order to avoid a constitutional confrontation, if it is possible for us to stop short of that point. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This consideration strongly supports our attention to the plaintiffs' non-constitutional arguments. We should not reach "[the] constitutional question although properly presented by the record, if there is also present [a statutory construction] ground upon which the case may be disposed of." *Id.* In rejecting the government's demand that we confine review to the consistency of the State Department's actions with the Constitution, we thus observe the "cardinal principle" directing a court first to inquire "whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Id.* at 348 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

Turning to the last of the government's threshold objections, we hold that the case is not moot. The government asserts that the State Department considers each visa application independently and that the present denials in no way bear on the results of any future application that the excluded aliens might make. *See* Brief for the Appellees at 26 n.23; Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 158. However, the reasons for the visa denials offered by the State Department and accepted by the district court indicate that the prospect of future denials of applications by these aliens is a genuine, and not merely a "theoretical[,] possibility." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

The State Department's dominant reasons for the denials that sparked this litigation do not refer to a particular event in the world whose cessation might induce the government to grant visa requests from the aliens whom plaintiffs invited to speak. Instead, the Department cites the continuing status of these aliens as members of organizations or governments hostile to the United States.[7] The aliens, whose affiliations apparently have not changed, assert that their interest in entering the United States continues, and the plaintiffs have represented that they still wish to invite these aliens to speak in this country. *See* Brief of Plaintiffs-Appellants at 9 (Pasti), 13 (Borge), 17 (Finlay and Lezcano). In light of the reasons for the visa denials tendered by the government and relied upon by the district court, these allegations of continuing interest suffice to establish a genuine prospect that the plaintiffs will suffer the same injury in the future. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 546-47 (1976).[8] We therefore reach the merits of the plaintiffs' claims.

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[7] This characterization of the government's reasons may be gleaned from publicly available documents. *See* Affidavit of Lawrence S. Eagleburger, *reprinted in* Joint Appendix at 141-43 (noting the membership or affiliation of each excluded alien); Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 162-65 (same); *see also Abourezk*, 592 F.Supp. at 888 (giving a general description of the reasons stated in the classified affidavits). This court has also examined the reasons offered in the *in camera* affidavits; they do not decrease our concern over the inaccuracy of the State Department's public representations that these visa denials do not in any way forecast the results of a future application.

[8] In addition, the plaintiffs assert that they are suffering a present and continuing harm in the form of the "chill" that the challenged State Department policy places on their first amendment interest in hearing foreign speakers. United States audiences are reluctant to extend invitations to foreign speakers, plaintiffs urge, for fear that the aliens may be subjected to the embarrassment of being denied a visa

III.

The plaintiffs raise three issues of statutory interpretation. They argue, first, that subsection (27) does not authorize exclusion on the basis of foreign policy concerns, as opposed to issues of "public interest or . . . [national] welfare, safety, or security . . . ." 8 U.S.C. § 1182(a)(27) (1982). Second, the plaintiffs contend that subsection (27) allows exclusion only if it appears that the alien's *activities* in the United States would endanger the public welfare and not if his or her mere *presence or entry* might do so. And, third, the plaintiffs suggest that the government's interpretation of subsection (27) violates the statute because it renders subsection (28) superfluous and undermines the restrictions Congress has placed on the Executive's use of subsection (28). *See* McGovern Amendment, 22 U.S.C. § 2691 (1982).

Our approach to statutory interpretation is informed by the guidelines the Supreme Court announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984). According to *Chevron*, a court must first examine the statutory provision in question to determine whether Congress had a specific intent with respect to the issue at hand. *See id.* at 2781. This examination should begin with the language of the statute, *see Consumer Product Safety Commission v. GTE Sylvania,*

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on the ground that they pose a danger to the public welfare. Similarly, the alien invitees may be unwilling to accept invitations when the price is to submit to such "ideological scrutiny." *See* Brief of Amici Curiae American Association of University Professors et al. at 12-13 (presenting examples of chilling effect). In the first amendment area, such "chill" has long been recognized by the courts as a harm independent from the actual application of the challenged statute. *See* Thornhill v. Alabama, 310 U.S. 88, 97 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion").

Inc., 447 U.S. 102, 108 (1980), but the court may also inspect legislative history and past administrative practice for any light these sources may shed on congressional intent. *See, e.g., Chevron*, 104 S.Ct. at 2791-92; *Rettig v. Pension Benefit Guaranty Corporation*, 744 F.2d 133, 144-50 (D.C. Cir. 1984). If the court finds that Congress had a specific intent with respect to the issue, the court stops there and enforces that intent regardless of the agency's interpretation. *See Chevron*, 104 S.Ct. at 2781-82 & n.9. If, however, the court finds that Congress had no specific intent, the agency's interpretation should be accorded great deference and invalidated only if it is not a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute . . . ." *Chevron*, 104 S.Ct. at 2783 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

Following these guidelines, we conclude, in agreement with the government and the district court, *see Abourezk*, 592 F.Supp. at 885-86, that Congress intended foreign policy concerns to rank among the national interests whose protection would justify exclusion of an alien under subsection (27). The broad language of (27) evinces no intent to restrict the kinds of governmental concerns that would qualify; the subsection speaks of "public interest[,] . . . welfare, safety, or security" and places no limitation on these encompassing terms. Only an isolationist view patently inconsistent with the reality of our late twentieth century world could account for a belief that the "public interest" and the "national welfare" were not dependent, in part, on the effective execution of our foreign policy. The court surely should not adopt on its own initiative such a counter-intuitive interpretation of expansive statutory language, and the plaintiffs have identified nothing in the legislative history or administrative practice to suggest that Congress intended to exclude foreign policy concerns from

consideration under subsection (27). Because the State Department's interpretation appears fully consistent with congressional intent, we need take this inquiry no further.

The plaintiffs also contend that subsection (27) explicitly authorizes exclusion based only on "activities" in which the alien may be expected to "engage" and not on mere entry or presence. The district court decided this issue for the government. *See Abourezk*, 592 F.Supp. at 884-85. We conclude that it did so on an inadequate record. We therefore remand for a fuller airing of the activity/mere entry question.

The language of the statute, as the Dissent acknowledges, supports the plaintiffs' interpretation on this issue. Dissent at 9. The provision does not say "persons whose presence in this country would be prejudicial to the interests of the United States are barred from entry." Rather, subsection (27) makes ineligible for a visa those aliens who "seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial" to United States interests. The specific reference to activities would be superfluous, indeed, misleading, if entry or presence alone could justify exclusion. A familiar cannon of statutory construction cautions the court to avoid interpreting a statute in such a way as to make part of its meaningless. *See* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1984). This basic guide and the plain thrust of the language of subsection (27), we emphasize, weigh heavily against the government's reading.

The terms Congress employed in other subsections on exclusion are also consistent with plaintiffs' interpretation. Section 1182(a) sets out thirty-three separate categories of excludable aliens; this enumeration demonstrates that Congress could and did clearly distinguish status-based categories from conduct-based categories. *See supra* at 3. Congress' undoubted ability to draft categories based only

on status, when that is the legislature's intention, strengthens the inference that the "words "to engage in activities" contained in subsection (27) were not put there inadvertently.

The legislative history on this issue, however, is not a prop upon which plaintiffs can rely. It is terse and tugs in more than one direction. The language of section 1182(a)(27) of the 1952 Immigration Act was taken almost verbatim from section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006 (repealed 1952). The Senate Reports on section 22 seem to assume that both existing law and the proposed section allowed exclusion when the very entry of the alien would be prejudicial to the public interest.[9] The Conference Committee Report, on the other hand, implies that existing law and section 22 authorize exclusion only on the basis of activities.[10]

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[9] The Senate Reports both state that

> [u]nder existing law, among the excludable aliens are certain aliens who seek to enter the United States whose entry would be prejudicial to the public interest or would endanger the safety of the United States. The committee has broadened this class of excludable aliens to include those aliens who seek to enter the United States to engage in activities which would endanger the welfare of the United States.

S. REP. No. 2230, 81st Cong., 2d Sess. 5 (1950); S. REP. No. 2369, 81st Cong., 2d Sess. 10 (1950).

[10] The Conference Committee Report states that the relevant section

> provides for the exclusion from the United States of aliens seeking to enter for the purpose of engaging in activities which are prejudicial to the public interest and dangerous to the welfare or safety of the United States, whether or not such aliens seek to enter the United States solely, principally, or incidentally for such purpose. Existing law merely provides for the exclusion of aliens if the Attorney General knows or has reason to believe that such aliens are seeking to enter the United States to engage in activities which would endanger the public safety of the United States.

H.R. REP. No. 3112, 81st Cong., 2d Sess. 54 (1950).

Given the inconclusive state of the legislative history,[11] evidence of congressional acquiescence (or the lack thereof) in an administrative construction of the statutory language during the thirty-four years since the current act was passed could be telling. Information about such acquiescence, or the absence of it, would rank as a significant indicator of the legislature's will. *See Zemel v. Rusk*, 381 U.S. 1, 8-12 (1965).[12] Unfortunately, evidence on this

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[11] The Dissent finds strongest support for the State Department's reading in the legislative history of a bill enacted in 1941 containing a prescription from which subsection (27) was later derived. Dissent at 7-9. We do not find the history of the earlier formulation as clear as the Dissent contends it is. On the contrary, one searches all the legislative history in vain for an illustration homing in on the question at issue.

Thus, one can only speculate on what the legislative report participants had in mind when they made their seemingly interchangeable references to "entry" and "activities." Conceivably, as the Dissent presumes, they believed "activity" embraced the "act" of entry. Or, they may have understood "entry" to implicate activities likely to be pursued upon admission. At least as plausibly, their word choices were casual and inadvertent, not motivated or informed by the precise consideration at issue in the instant cases.

In sum, we think it plainly wrong as a general matter, and in this case in particular, to regard committee reports as drafted more meticulously and as reflecting the congressional will more accurately than the statutory text itself. Committee reports, we remind, do not embody the law. Congress, as Judge Scalia recently noted, votes on the statutory words, not on different expressions packaged in committee reports. Hirschey v. FERC, 777 F.2d 1, 7-8 & n.1 (D.C. Cir. 1985) (Scalia, J., concurring).

[12] There is no possibility of congressional acquiescence in a longstanding *judicial* construction. The parties have uncovered only two court cases, in addition to this one, concerning the scope of subsection (27). In El-Werfalli v. Smith, 547 F.Supp. 152 (S.D.N.Y. 1982), the court held that a Libyan student seeking to enter the United States in order to study airplane maintenance was properly excluded under subsection (27). While such study does not rise to the level of subversive activity, it clearly constitutes an "activity" exceeding mere

point was thin when the district court determined to accept the State Department's interpretation, for that court had stayed discovery pending the government's motion to dismiss. *See Abourezk v. Reagan*, No. 83-3739 (D.D.C. Feb. 8, 1984). The only evidence of administrative practice now in the record consists of conflicting assertions in the affidavits of past and present State Department officials and a sparse collection of illustrations. *Compare* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 159-60 (present Deputy Assistant Secretary of State), *with* Affidavit of Leonard C. Meeker, *reprinted in* Joint Appendix at 252 (former Legal Adviser to the Department of State).

The illustrations—advanced by the State Department as indicative of an administrative practice of excluding aliens under subsection (27) based on entry or presence alone—include descriptions of three actual visa denials and four examples listed in the State Department Manual. While these illustrations provide some support for the government's position, they are inadequate to enable a court to determine reliably the nature of the general administrative practice under subsection (27).

The Manual offers the following examples of aliens whose visa applications might properly be denied under (27): an alien who might engage in conspiratorial activity against the United State while in the country; an alien who is known to be a member of a terrorist organization; an alien who is associated with a criminal organization; and an alien official who engaged in physical brutality while in power or was associated with a regime that did so. *See* Brief of Plaintiffs-Appellants at 37 (citing FOREIGN

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presence. In Allende v. Shultz, No. 83-3984-C (D. Mass. April 2, 1985), the court did not reach this precise issue because it held the government's reasons for exclusion inadequate on other grounds. *See infra* note 16. Thus, judicial opinions provide no grounding for the State Department's interpretation.

AFFAIRS MANUAL, Pt. II, § 41.91(a)(27), *reprinted in* 6 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 32-214.18 (1985)). Although the first three examples may be explained in terms of the aliens' probable activity in the United States, the last example, the government argues, embodies the State Department's longstanding view that exclusion under subsection (27) is appropriate when the mere entry of the alien would prejudice foreign policy objectives. In that example, the government is concerned, not about the possibility that the official might engage in physical brutality while in the United States, but about the impact of the very admission of such a person on our foreign policy interests. *See* Brief for the Appellees at 56 n.42. This fourth example in the Manual may represent an open assertion of the power to exclude under subsection (27) on the basis of entry alone; such an assertion of authority may warrant the implication of an executive policy, even if the policy is only infrequently applied, and may contribute to a showing of congressional acquiescence in that policy. *See Haig v. Agee,* 453 U.S. 280, 303 (1981).

The State Department also offers three instances of actual visa denials that were allegedly based on entry rather than activity and were reported to various members of Congress and committees. In two of the cases the reasons for denial included references to the alien's anticipated activities in the United States. *See* Second Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 306, 308.[13] In the third case, however, the State Department appears to have

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[13] In 1959, 1961, and 1962, the Stater Department refused a visa to Thomas W.I. Liao, the self-appointed leader of a movement to establish an independent Formosa. The Department found that there was "a clear incompatibility between Mr. Liao's projected activities while in the United States and our foreign policy objectives with respect to Taiwan and the Republic of China." Second Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 306. In July of 1964,

applied the fourth example in the Manual: in that case, former Nazi SS officer Otto Skorzeny was denied a visa under subsection (27) for foreign policy reasons. *See id.* at 306. Thus, there seems to be at least one instance, of which Congress was apprised, in which the State Department actually applied the interpretation of subsection (27) that the government presses in this litigation.

This meager evidence does not demonstrate the kind of consistent administrative interpretation necessary to give rise to a presumption of congressional acquiescence. *See Kent v. Dulles*, 357 U.S. 116, 128 (1958) (holding that "scattered rulings . . . not consistently of one pattern" are an insufficient basis on which to impute congressional intent). The examples cited by the State Department, in conjunction with the inconclusive legislative history, however, do cast some doubt on the plaintiffs' interpretation, an interpretation that otherwise seems indicated by the language of the statute. In order to weigh the relative persuasiveness of the two interpretations, the district court needed more information.[14] It should have asked the government to come forward with further examples of the

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the Department also denied a visa to Mme. Ngo Dinh Nhu, the sister-in-law of the late Prime Minister of Vietnam, on the ground that "her expected activities would only serve as a demoralizing influence on the people and Government of Vietnam," which the United States was committed to support. *Id.* at 308.

[14] The Dissent suggests, and we acknowledge, that such information may be difficult to find or inconclusive. *See* Dissent at 12-13. Given this record, however, one can only offer guesses, bets, or suspicions about the existence or weight of such evidence. We do not think it proper to prejudge this issue on a barren record and thereby short-circuit the inquiry into congressional intent. The district court, upon fuller consideration, may find the evidence of congressional acquiescence insufficient in quantity or quality, but that judgment, we think, should be made *after* an examination of the available evidence, not before.

exercise or assertion of power to exclude under subsection (27) on the basis of presence alone; and, in fairness, it should have allowed the plaintiffs sufficient discovery to contest those examples and provide counter-examples.[15]

Without thus developing a more substantial record, the district court could not make a secure finding concerning the nature of the administrative practice under subsection (27). And without such a finding, given the inconclusive state of the legislative history and the strength of the plaintiffs' textual argument, the district court's decision in favor of the government's interpretation was premature. We therefore set aside the district court's holding on this issue and remand for the fuller proceedings appropriate prior to resolution of this question of statutory interpretation.

The plaintiffs also contend that the government's interpretation of subsection (27) violates the statute because it effectively swallows up subsection (28) and thereby nullifies the restrictions placed by the McGovern Amendment on the use of the latter subsection. We find this argument persuasive. The Executive may not use subsection (27) to evade the limitations Congress appended to subsection (28).

The McGovern Amendment calls upon the Secretary of State to recommend a waiver of ineligibility, and thereby open the way for admission of an alien who belongs to a subsection (28) organization, unless the Secretary certifies to the Congress that admission of the alien would "be contrary to the security interests of the United States. . . ." 22 U.S.C. § 2691(a) (1982). The district judge in this case found that prejudice to foreign policy did not qualify as a "security interest" within the meaning of the McGovern

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[15] We note in this regard that the government has named a few persons to whom visas were denied, allegedly under the authority of subsection (27), and has not suggested that any privilege would shield a further listing of cases in point.

Amendment. *See Abourezk*, 592 F.Supp. at 855; *accord Allende v. Shultz*, No. 83-3984-C, slip op. at 9 n.2 (D. Mass. April 2, 1985). The State Department itself appears to have reached the same conclusion. *See* Brief of Plaintiffs-Appellants, app. B at 2 (letter from Alvin Paul Drischler, Acting Assistant Secretary of State, to George Bush, President of the United States Senate (Oct. 18, 1983)) ("The result [of the McGovern Amendment] has been that the Secretary of State is effectively precluded from acting in such cases on the basis of legitimate foreign policy factors and considerations.").

If the government could use subsection (27) to exclude aliens whose entry might threaten our foreign policy objectives simply because of their membership in Communist organizations, then subsection (28) would be made superfluous and the congressional will expressed in the McGovern Amendment will be nullified. Conversely, the restrictions on subsection (28) must not be read in a fashion that would rob subsection (27) of its independent scope and meaning. To preserve the significance of both sections, and the congressional intent that guided their adoption, the two sections must not be homogenized or treated as interchangeable parts. *See Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) (holding that courts must interpret statutes in such a way as to give effect to all of their provisions).[16]

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[16] The district court in Allende v. Shultz, No. 83-3984-C (D. Mass. April 2, 1985), adopted this view. Finding it "unnecessary. . . to scrutinize the parameters of subsection (27)," the court recognized that traditional principles of statutory construction required that "[a]mong the classes of aliens to which subsection (27) does *not* apply are those which fall squarely within the ambit of one of the other thirty-two statutory categories . . . ." *Id.* at 8. "Because subsection (28) directly encompasses Mrs. Allende's membership in [two communist organizations]," the court held that "her affiliation with these

The government argues that it has distinguished the two sections by using (27) only when it has a reason for exclusion in addition to the alien's membership in an organization listed in (28). *See* Transcript of Proceedings at 38-40, *Abourezk v. Reagan*, No. 84-5673 (D.C. Cir. Sept. 23, 1985). This standard, however, is inadequate to prevent subsection (27) from overwhelming and obliterating subsection (28) and the McGovern Amendment. A reason that is *in addition to* the fact of membership but not *independent of* that fact provides an insufficient bulwark against the possibility of Executive evasion of the will of Congress as expressed in the McGovern Amendment.

For example, the broadest generalization about the character or activities of members of a group would be a reason in addition to the bare fact that a particular alien belonged to that group. But to exclude an alien based on the perceived bent or proclivities of members of a subsection (28) organization would contravene the core purpose of the McGovernment Amendment. The Amendment was intended to implement the United States' promise under the Helsinki Accords[17] to promote the free flow of people and ideas across national borders. *See* 22 U.S.C. § 2691(a) (1982); S. REP. No. 194, 95th Cong., 1st Sess. 13 (1977). The Amendment fullfills that commitment by assuring that a would-be speaker is not condemned by association with a subsection (28) organization[18] if he is "otherwise

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organizations is not, in itself, a 'facially legitimate and bona fide' reason for her exclusion within the meaning of subsection (27)." *Id.* at 9 (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

[17] Final Act of the Conference on Security and Co-Operation in Europe, Aug. 1, 1975, Dep't of State Pub. No. 8826 (Gen. For. Pol. Ser. 298), *reprinted in* 14 I.L.M. 1292 (1975).

[18] Nothing in our analysis inhibits the State Department from using a group affiliation to deny visas to members of terrorist groups, *see* MANUAL, *supra* at 20, or organized crime syndicates, *see id.* The McGovern Amendment applies only to the organizations specifically

admissible." 22 U.S.C. § 2691(a) (1982). A visa denial based on a generalization about the members of a subsection (28) group surely qualifies as the brand of guilt by association Congress sought to check. No reason particular to this alien or this moment in time distinguishes such a denial; the denial is appropriate for all members at all times because it is simply a condemnation of the group as a whole.[19]

We hold that when an alien is a member of a proscribed organization, so that subsection (28) applies, the government may bypass that provision and proceed under subsection (27) only if the reason for the threat to the "public interest[,] . . . welfare, safety, or security" is *independent of* the fact of membership in or affiliation with the proscribed organization. Only if such an independent reason exists will the use of subsection (27) leave intact the congressionally mandated restrictions on subsection (28).[20]

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proscribed by the Act and, of the thirty-three categories of excludable aliens, only subsection (28) specifically addresses membership in or affiliation with an organization as the basis for exclusion. The organizations proscribed in (28) are Communist and anarchist groups. *See* 8 U.S.C. § 1182(a)(28) (1982).

[19] The government has offered no evidence of congressional acquiescence in an administrative practice that would alter our view that the legislature did not cast subsections (27) and (28) as interchangeable parts. Indeed, when asked at oral argument, government counsel was unable to identify any case other than this one and *Allende*, No. 83-3984-C (D. Mass. April 2, 1985), in which subsection (27) was used to deny a visa to an alien to whom subsection (28) applied. *See* Transcript of Proceedings at 41-42, *Abourezk v. Reagan*, No. 84-5673 (D.C. Cir. Sept. 23, 1985).

[20] The Dissent argues that the McGovern Amendment retains its vitality even without the interpretation we embrace today. Without the McGovern Amendment, subsection (28) would pose a presumptive bar to the entry of any member of a Communist organization. The Dissent points out that the State Department has not explicitly revived that policy of general exclusion, it has simply determined to exclude

The Dissent finds sufficient reason, separate from the applicants' membership in proscribed organizations, for upholding the government's action under subsection (27). This reason consists of alleged affiliations of the visa applicants with particular governments hostile to the United States (the governments of Nicaragua, the Soviet Union, and Cuba). *See* Dissent at 17-19. We do not reject affiliation with a particular foreign government as beyond the

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members of those subsection (28) organizations it believes to be affiliated with certain foreign governments. *See* Dissent at 22. The Dissent makes the practical prediction that not all subsection (28) organizations will be so affiliated, and therefore finds that the McGovern Amendment is left intact.

The Dissent's analysis, we believe, is flawed in this respect: the issue turns not on practical predictions but on the possesion of power. If the State Department's current policy entails the power to achieve precisely the same results as under subsection (28) before the McGovern Amendment, then it is small virtue that those results now can be achieved without explicitly reviving a policy of ideological exclusion. Under the Dissent's interpretation of the statute, the State Department may exclude someone simply by pointing to her membership in a subsection (28) organization; the additional, conclusory assertion that the organization has certain affiliations provides no safeguard because the assertion may be offered in every case and cannot be questioned or reviewed by any court. *See* Dissent at 17 n.4. A statement thus walled off from any effective challenge scarcely qualifies as a reason.

The State Department therefore remains armed with the power to exclude all members of subsection (28) organizations for foreign policy reasons. That is precisely the power the McGovern Amendment was designed to revoke. We conclude that the State Department's approach does not leave the McGovern Amendment intact and that the more stringent standard we adopt is necessary to effectuate congressional intent.

This standard will also leave intact the independent scope of subsection (27). For example, all four of the illustrative applications of (27) in the State Department's MANUAL, *see supra* at 20, would still be appropriate under our view of the respective provinces of the two clauses.

pale of subsection (27). However, if the alleged government affiliation is presumed *because of* the applicant's membership or participation in a subsection (28) organization, we would not count that presumption as independent of the organizational tie. In other words, if all members of a proscribed organization were automatically branded "affiliates' of a certain government, that branding would be no more independent of the fact of membership than the generalization about the character or activities of group members to which we earlier referred. *See supra* at 24-25.[21] On the other hand, if the State Department pinpoints the alien's official post or action as an offical repre-

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[21] The Dissent suggests that this interpretation creates a "favored entry status" for communists: members of organizations not included in subsection (28) can be excluded on foreign policy grounds under subsection (27) simply because their membership links them to a hostile foreign government, but members of subsection (28) groups cannot. *See* Dissent at 23. The McGovern Amendment was, however, a response to the historically *disfavored* position of subsection (28) organizations. The imaginary Council in the Dissent's hypothetical never suffered from the explicit ideological exclusion embodied in subsection (28) or the extreme and general public hostility that motivated Congress to include that subsection in the Act in 1952. *See generally* THE MEANING OF MCCARTHYISM (E. Latham ed. 1965) (a collection of essays on the causes and effects of McCarthyism).

Congress could reasonably have believed that these special disabilities warranted special precautions where subsection (28) organizations were concerned. If a member of a subsection (28) group poses a threat to national security, she stands on the same footing as a similarly threatening member of any other type of group. But where no such threat is present, Congress determined that a close look is in order, in fidelity with the Helsinki Accords, *see supra* at note 17, before the United States excludes members of subsection (28) organizations. This closer look insures that the longstanding practice of excluding such persons under subsection (28)—which codified an historically demonstrated animosity—does not taint exclusions after the McGovern Amendment's repudiation of that animosity.

sentative of a hostile government as *the* reason for the exclusion under subsection (27) on foreign policy grounds, then the "independent of" organizational membership standard would be met.[22]

The State Department, however, has so far obscured its position. It mentioned both subsection (28) organizational affiliations and connections between the visa applicants and certain foreign governments. *See, e.g.*, Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 162-65. But at the same time, the Department volunteered that earlier in the same year (1983), during Borge's incumbency as Interior Minister of Nicaragua, a visa application for his travel to the United States had been approved. *Id.* at 166. Similarly, the Department represented that both Finlay and Pasti "have previously received [non-immigrant visas] and travelled to the United States." *Id.* In short, the Department has never squarely advanced as the rationale for exclusion the applicants' government ties rather than their subsection (28) organization member-

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[22] The Dissent describes our "independent reason" safeguard as ineffective, entirely vulnerable to the power the Attorney General holds: he may deny a visa under subsection (28) despite the Secretary's recommendation of entry. *See* Dissent at 24-25. Foreign policy, however, is the Secretary's specialty; it is not the Attorney General's customary field. Our decision, it is true, in no way prevents the Attorney General from venturing into the foreign policy domain. But we expect, as we assume Congress did when it adopted the McGovern Amendment, that instances in which the Attorney General rejects action in the foreign policy realm that the Secretary recommends will be extraordinary. In sum, Congress apparently designed the Amendment with the traditional division of responsibility between the two executive departments in full view. Such divisions of responsiblity, and the closely kept balance of powers that results from them, have long been regarded as an effective check on the disingenuity of individual public officials. *See* The Federalist No. 51, at 344-45 (J. Madison) (P. Ford ed. 1898). So long as the traditional allocation of responsibility between the two departments is maintained, Congress' action and our endeavor to assure its validity should not be exercises in futility.

ship.[23] Instead, it has taken an "either/or" stance. *See Abourezk*, 592 F.Supp. at 888 (*in camera* affidavits show that applicants were denied entry "because of their personal status as officials of governments *or* organizations which are hostile to the United States") (emphasis supplied).

If we were to deem it sufficient, as the Dissent does, for the State Department so to rest on pleas in the alternative, we would shirk our obligation to enforce the congressional direction, which the Dissent acknowledges, *see* Dissent at 14, to pay genuine heed to the McGovern Amendment. The Department, as the agency charged by Congress with

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[23] Perhaps the State Department has shied away from this rationale in part because it is problematic whether all of these aliens have independent affiliations with hostile governments. Tomas Borge clearly has such a connection: he holds a cabinet post in the Nicaraguan government. But some of the other speakers in this case lack such an unambiguous connection to a hostile foreign government. For example, if Nino Pasti has any governmental affiliation, it is to the Italian government, in which he served as both a Senator and a General in the armed forces. *See* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 163. Of course, no one—neither the State Department nor the Dissent—argues that Pasti was, or should be, excluded because of a connection to the government of Italy. Instead, the suggestion is that Pasti's affiliation with the *Soviet* government warrants his exclusion. This alleged affiliation consists, however, solely and simply in Pasti's participation in the World Peace Council, an organization clearly covered by subsection (28) and the McGovern Amendment. *See* Affidavit of Louis P. Goelz, *reprinted in* Joint Appendix at 163. Similarly, Leonor Rodriguez Lezcano, so far as the current record indicates, has never held public office in Cuba or actively represented the government of that country. Her affiliation with the Cuban government apparently arises, according to the State Department, because of her participation in the Federation of Cuban Women, a subsection (28) organization. *See id.* at 164-65. Thus, we do not now comprehend any basis for claiming that these two visa applicants have governmental affiliations independent of their membership in subsection (28) organizations.

the administration of the statute, of course would retain authority initially to frame criteria for determining when a sufficiently independent reason exists to warrant invocation of subsection (27). The Department's criteria must be clear enough to allow the courts to fulfill their responsibility to insure that the executive authority respects congressional intent, but the precise contours of the "independence inquiry" should be left, in the first instance, to the sound and expert judgment of the State Department. We therefore remand the three consolidated cases so that both the district court and the government may reevaluate these visa denials without the statutory misinterpretation that casts doubt on their previous analyses.[24]

IV.

We note our grave concern about the district court's heavy reliance upon *in camera ex parte* evidence when it granted the defendants' motion for summary judgment. That court evaluated the public documentation as "entirely conclusory" and inadequate; it thereupon turned to the classified affidavits and asserted that it found in them information justifying its final disposition. *See Abourezk*, 592 F.Supp. at 886-87. We caution the district court, in the further proceedings this opinion requires, to make certain that plaintiffs are accorded access to the decisive evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests.

It is hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the

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[24] Because we find that questions remain concerning the State Department's compliance with the statutory requirements, we do not reach the plaintiffs' constitutional claims. We therefore express no opinion about the section of the district court opinion devoted to the analysis of those claims.

reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions. *See In re Application of Eisenberg*, 654 F.2d 1107, 1112 (5th Cir. 1981).

Exceptions to the main rule are both few and tightly contained. Nost notably, inspection of materials by a judge isolated in chambers may occur when a party seeks *to prevent use* of the materials in the litigation. When one side, seeking to block consideration of relevant matter, asserts an evidentiary privilege, the court may inspect the evidence *in camera* and alone for the limited purpose of determining whether the asserted privilege is genuinely applicable. *See id.* If the court finds that the claimed privilege does not apply, then the other side must be given access to the information; if the court's finding is that the privilege does apply, then the court may not rely upon the information in reaching its judgment. *See Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 104 S.Ct. 1316 (1984). In either case, no party will be faced—as were the plaintiffs in this case—with a decision against him based on evidence he was never permitted to see and to rebut.

Only in the most extraordinary circumstances does our precedent countenance court reliance upon *ex parte* evidence to decide the merits of a dispute. Our one case in point, *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815 (D.C. Cir. 1984), involved the state secrets privilege, a privilege not invoked in this case. The government pressed acute national security concerns in *Molerio*, and we recognized a large risk that an unjust result would eventuate if the case proceeded without the privileged material. *See id.* at 825. While we allowed court recourse to the confidential information in *Molerio*, we based that allowance upon proper invocation of the privilege; a demonstration of compelling national security concerns;

and public disclosure by the government, prior to any *in camera* examination, of as much of the material as it could divulge without compromising the privilege. In addition, the plaintiff in *Molerio* had been accorded considerable discovery of non-privileged materials. *See id.* at 819; *see also Ellsburg*, 709 F.2d at 63-64.

We mention finally a third class of cases in which *in camera* inspection may occur: exceptions to the main rule specified by statute. The prime current example is the Freedom of Information Act, 5 U.S.C. § 552 (1982). Even in administering such legislation, however, we have been vigilant to confine to a narrow path submissions not in accord with our general mode of open proceedings. *See, e.g., Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (requiring the government to create a public index listing privileged documents and providing explanations of the claim of privilege). No statutory scheme permitting closeted inspection of evidence is implicated in this case.

In sum, we expect the district court, on remand, to be mindful of the tight boundaries set in *Molerio*, and of the overriding importance of assuring plaintiffs' receipt of the most complete information and explanation permissible.

V.

The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.

Congress, in the legislation at issue, has specified categories of excludable aliens and has qualified the application of one of those categories through the passage of the McGovern Amendment. The State Department must

respect the restrains Congress imposed. The district court's conclusion that the congressionally prescribed boundaries had not been transgressed was insufficiently grounded; the court proceeded to judgment without the exploration of administrative practice necessary to an informed decision and it did not adequately advert to the relationship between two statutory provisions. We therefore vacate the district court's judgment. We remand the three consolidated cases for reexamination of the visa denials in question to insure that the challenged government action is within the statutory and constitutional authority of the State Department.

Judgment vacated and cases remanded for proceedings consistent with this opinion.

BORK, *Circuit Judge, dissenting*: In these consolidated cases, we review the denial of non-immigrant visas to four applicants who wish to enter the United States – Thomas Borge, Nino Pasti, Olga Finlay, and Leonor Rodriguez Lezcano. The plaintiffs are American citizens who wish to meet with these applicants if they are permitted to enter the United States.

Each of these applications was denied pursuant to 8 U.S.C. § 1182(a)(27) (1982), which requires exclusion of aliens who "the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Thomas Borge is the Interior Minister of Nicaragua and a member of the National Directorate of the Sandinista Front for National Liberation. Nino Pasti, formerly a member of the Italian Senate, is an active participant in the World Peace Council, which the State Department characterizes as an instrumentality of the Soviet Union. Olga Finlay and Leonor Lezcano are officials of the Federation of Cuban Women, which, according to the State Department, is controlled by the Cuban Communist Party. Finlay has served as the Cuban representative to the United Nations Commission on the Status of Women. According to the American official who received their applications, both women were the bearers of Cuban diplomatic passports, and their visa applications were conveyed via diplomatic note from the government of Cuba. Affidavit of Louis P. Goelz, Joint Appendix ("J.A.") at 153-67. the United States government determined that the entry of these applicants would be prejudicial to the public interest, and declined to grant them visas.

Plaintiffs challenge these decisions—and the judgment of the district court upholding their legality—on both statutory and constitutional grounds. They assert that the Executive acted without statutory authority on three grounds: because subsection (27) does not authorize exclusion simply on the basis of foreign policy (as opposed to national security) concerns; because subsection (27) does not authorize the exclusion of an applicant when it is his mere entry, rather than the specific activities in which he intends to engage, that will be prejudicial to the public interest; and because the government's interpretation will effectively nullify 22 U.S.C. § 2691 (1982) (the McGovern Amendment). The majority opinion rejects the first argument and remands on the basis of its analysis of the second and third. The majority therefore does not need to address the plaintiffs' other set of claims—that such authority, if in fact authorized by statute, is unconstitutional both as a violation of the first amendment and as inconsistent with fundamental principles of separation of powers.

While I agree that we have jurisdiction to reach the statutory issues presented,[1] I disagree with the analysis

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[1] Defendants have raised before us, as they did below, the question of whether plaintiffs have standing to mount a *statutory* challenge to these exclusions. They concede that the Supreme Court has already implicitly decided the issue of whether plaintiffs who wish to meet with excluded aliens have standing to raise a constitutional (first amendment) claim. Kleindienst v. Mandel, 408 U.S. 753 (1972). They argue, however, that the associational rights sufficient to confer first amendment standing in this case provide no standing to contend that the government lacks statutory authority for the exclusions.

The two sets of claims, however, cannot so easily be broken apart. A court faced with this constitutional challenge must first construe the statutes to determine whether they authorize what was done and, if so, whether they pass constitutional muster. It would be extraordinary if the court found that the statutes did not authorize the exclusions, thus the first amendment did not invalidate the statutes, but, since the challenge and standing were based on the first amendment, the court was without power to rule the unauthorized exclusions illegal. This

used by the majority to resolve them, and dissent from the holding of today's decision. Because I conclude that the statute permits what the government has done, I go on to reach the constitutional challenge and conclude that it fails.

I.

The initial issue in this case is one of statutory construction. We are governed, as the majority notes, by the principles articulated by the Supreme Court in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984). The Court in *Chevron* made clear that a court "must give effect to the unambiguously expressed intent of Congress" if such intent can be gleaned from the statutory language and legislative history. *Id.* at 2781-82. If, however, the statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 2782. The Court went on to note that to approve an administrative construction a court "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or

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would be witty, no doubt, but it smacks too much of the hairsplitting that brought the old rules of common law pleading into disrepute.

When the actions of the executive branch are challenged as violative of constitutional rights, the issue of the scope and source of executive authority necessarily becomes part of the analysis in which a court is required to engage. For example, in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Supreme Court invalidated President Truman's seizure of a steel mill because it was authorized neither by an explicit grant of power from Congress nor by any inherent Executive power. Had President Truman relied not on his inherent authority but rather upon a statute which did not in fact confer upon him the necessary power, his act would have been invalidated nonetheless. That is the situation the majority thinks may exist here. Whether the majority is right or wrong on the statutory issue, there can be no question that appellants have standing to raise it.

even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 2782 n.11. Therefore, where the traditional tools of statutory analysis lead to confused or contradictory interpretations, a reasonable reading of the statute given by the agency charged with its execution must be upheld.

This principle of deference applies with special force where the subject of that analysis is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs. Such authority is fundamentally executive in nature. When a court undertakes to review such decisions, it is "dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936). The Supreme Court has described the exclusion of aliens as "a fundamental act of sovereignty," stating that "the right [to exclude] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). Therefore, in its delegations of power in the area of foreign relations, Congress "must of necessity paint with a brush broader than that it customarily wields in domestic areas," *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965), and "[p]ractically every volume of the United States Statutes contains one or more acts . . . of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States* v. *Curtiss-Wright Export Corp.*,

299 U.S. at 324. The Immigration and Nationality Act is one such statute; it mandates exclusion in thirty-two separate categories, while preserving in subsection (27), in the broadest of terms, the authority of the Executive to order additional ones.

I have discussed these basic principles at the outset because I do not believe the majority opinion gives them appropriate weight, either when it requires the government to come forward with further examples of prior administrative construction, or when it adopts an overly restrictive interpretation of the McGovern Amendment in order to prevent the Executive from "evading" the terms of that provision.

II.

The majority remands this case to the district court so that more information may be gathered to resolve conflicting claims over prior administrative interpretations of subsection (27). I believe the remand, and the further inquiry, to be unnecessary. The issue around which these claims revolve—whether subsection (27) authorizes denial of a nonimmigrant visa when only the applicant's entry or presence, as opposed to his specific activities, are deemed prejudicial to the public interest—is one that can be fairly resolved on the basis of the legislative history and the record now before us, and I see little to be gained through the taking of further evidence. The legislative reports accompanying subsection (27) and earlier enactments—the present provision traces its lineage to laws passed in 1950 and 1941—made clear that when the entry, presence, or admission of an applicant would be prejudicial to the public interest, that applicant would be ineligible to receive a visa.

When Congress enacts a new statute that repeats the language contained in an older statute, there is a heavy presumption that Congress meant the same thing in each,

particularly when the new statute is in part a codification of existing law. *See Doe* v. *diGenova*, 779 F.2d 74, 82 (D.C. Cir. 1985); *Stribling* v. *United States*, 419 F.2d 1350, 1352-53 (8th Cir. 1969). *Accord* 2A N. Singer, *Sutherland Statutory Construction* § 53.03, at 554 (Sands 4th ed. 1984). That is the situation with respect to subsection (27).

The Senate and House Reports accompanying the current law, the Immigration and Nationality Act of 1952, indicate that section 1182(a)(27)-(29) incorporated the parallel provisions of the Internal Security Act of 1950, ch. 1024, 64 Stat. 987, along with certain revisions. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 30 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess. 10 (1952). Section 1182(a)(27) was derived from section 22 of the Internal Security Act of 1950, which had excluded from admission:

> [a]liens who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States . . . .

64 Stat. 1006 (amending Act of Oct. 16, 1918, 40 Stat. 1012, 8 U.S.C. § 137 (1946). The Immigration and Nationality Act retained that language in its entirety, revising it only by changing "welfare or safety" to "welfare, safety, or security."

As the majority notes, the Senate Report accompanying the Internal Security Act described this paragraph as:

> an admixture of existing law and the new provisions of the bill. Under existing law, among the exciudable aliens are certain aliens who seek to enter the United States whose *entry* would be prejudicial to the public interest or would endanger the safety of the United States. The committee has *broadened* this class of ex-

> cludable aliens to include those aliens who seek to enter the United States to engage in activities which would endanger the welfare of the United States.

S. Rep. No. 2369, 81st Cong., 2d Sess. 10 (1950) (emphasis added); *accord* S. Rep. No. 2230, 81st Cong., 2d Sess. 5 (1950). The Internal Security Act, therefore, was explicitly described as including and broadening existing provisions prohibiting prejudicial entry. This is not a counterintuitive interpretation; it would be surprising if Congress meant to bar aliens who would engage in prejudicial activities, but admit those whose very entry would be prejudicial to the public interest.

The Immigration and Nationality Act incorporated this language, and this interpretation as well. In one of its few specific references to subsection (27), the accompanying Senate Report made mention of:

> an alien [who] appears to be excludable under paragraph (27), (28), or (29) of section 212(a) as an alien whose *entry* would endanger the public safety or security of the United States or as an alien who is a member of one of the subversive classes of excludables. . . .

S. Rep. No. 1137, *supra*, at 27 (emphasis added).

This was the interpretation given this language by a prior Congress as well. The language of subsection (27) had its origin in a bill enacted in 1941, which provided:

> [t]hat whenever any American diplomatic or consular officer knows or has reason to believe that any alien seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States, he shall refuse to issue to such alien any immigration visa, passport visa, transit certificate, or other document entitling such alien to present himself for admission into the United States.

55 Stat. 252. In a number of respects, this was a more narrowly written provision than the one later enacted as 8

U.S.C. § 1182(a)(27) (1982). First, it did not grant the Attorney General authority to make these determinations; he was not so authorized until an Act of Congress passed in 1948, ch. 338, 62 Stat. 268. Second, the 1941 language referred only to activities endangering the "public safety," while the Immigration and Nationality Act included those "prejudicial to the public interest" and dangerous to the country's "welfare" or "security" as well. Third, the bill enacted in 1941 referred simply to aliens seeking to enter the country "for the purpose of engaging in activities" thought to merit exclusion, while the Immigration and Nationality Act refers to those aliens who seek to enter "solely, principally, or incidentally to engage in [such] activities."

Despite the seemingly more restrictive statutory definition of "activities," the legislative history makes clear that the Congress that enacted the 1941 legislation saw the bill as excluding those whose *entry* or *presence* would endanger the public safety. According to the Senate Report:

> The purpose of the legislation is to provide means not now afforded by law of keeping out of this country certain aliens, otherwise admissible, whose *presence* in the United States would be dangerous to the public safety.

S. Rep. No. 386, 77th Cong., 1st Sess. 1 (1941) (emphasis added). That Senate Report was only two pages long and relied for its explanation of the bill primarily upon two pieces of correspondence describing the legislation—one from the Attorney General, and one from the Acting Secretary of State. The letter from the Attorney General described the bill as authorizing.

> the refusal of visas to aliens whose *entry* into the United States would endanger the public safety.

Id. (emphasis added). The letter from the State Department described the bill as authorizing.

> the refusal of visas to aliens whose *admission* into the United States would endanger the public safety.

Id. at 2 (emphasis added). Similarly, the chief sponsor of the bill, Senator Russell, explained on the Senate floor that the bill.

> purports to confer a power on the members of the Consular Service abroad which I already thought they had. It merely permits the consuls to refuse visas to aliens whom they know or have reason to believe are persons whose *presence* in the United States will be inimical to the public interest.

87 Cong. Rec. 4757 (1941) (emphasis added).

It seems evident, therefore, that in making reference to "activities" in this context, Congress has done so with the understanding that the term encompasses entry and presence as well. Standing against these consistent references to "entry" is the Conference Report cited by the majority, maj. op. at 18 n.10, which refers to prejudicial "activities." H.R. Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950). That part of the Conference Report, however, simply recites, virtually word for word, the language of the statute itself. It provides no additional explanation of elaboration, and does not seek to describe what Congress understood those words to mean. It is the language of the statute itself, which uses the term "activities," that provides the most persuasive support for the plaintiffs' position.

Had we before us nothing but the language of the statute, without any legislative history, I might be inclined to adopt the construction proposed by the plaintiffs. The question would by no means, however, be free from doubt, for it is not at all clear—from the language alone—whether presence within this country can itself be

deemed an "activity." In any event, as Justice Harlan has written, "[t]he decisions of [the Supreme] Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for 'literalness may strangle meaning.' " *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962) (quoting *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946)) (other citations omitted). When Congress has repeated again and again that it enacted these words with an understanding that they required the exclusion of aliens whose entry would be harmful, I think it necessary to conclude that the sharp dichotomy between "entry" and "activities" that is urged upon us is incompatible with congressional intent. And to the extent that this question is regarded as close, I find controlling both the teaching of *Chevron* and the deference Congress and the courts have traditionally accorded Executive determinations in matters pertaining to foreign relations.

This remand is therefore unnecessary. The majority finds it "conceivable" that the repeated references to entry in the legislative history were meant to authorize what they purported to authorize. Maj. op. at 18 n.11. I think it more than conceivable. But even if this repeated usage was "casual and inadvertent, not motivated or informed by the precise consideration at issue in the instant cases," *id.*, we are still left with *Chevron*, which held that when Congress "has not directly addressed the precise question at issue," a court must defer to a reasonable administrative interpretation. 104 S.Ct. at 2782. I find it difficult to understand how an interpretation offered half a dozen times by Congress in the legislative history can possibly be unreasonable when adopted by officials in the executive branch. The majority may find another interpretation more plausible, but that is not the standard we are charged to apply.

The majority has not in fact determined that the interpretation was unreasonable, but believes that evidence of possible congressional acquiescence is necessary before a proper conclusion can be reached one way or the other.[2]

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[2] As the majority notes, there is already some evidence in the record of prior administrative interpretation supporting the government's position. The State Department Manual lists four "type cases [that] are illustrative, but . . . by no means exclusive, of those involving a determination of the applicability" of subsection (27). One of the four type cases consists of

> [a]liens who are notorious for allegedly engaging in excesses, including physical brutality while in political power in their native land, or who were prominently identified with any former regime which did so.

Foreign Affairs Manual, pt. II, § 41.91(a)(27), *reprinted in* 6 C. Gordon & H. Rosenfeld, *Immigration Law and Procedure* 32-214.18 (1985). The concern reflected here has nothing to do with the specific activities in which these aliens are expected to engage while in the United States, but is rather an expression of disapproval of brutal governments; hence the exclusion of those "identified" with such regimes.

The majority also discusses three specific past exclusions under subsection (27) cited by the government and concludes that only one of the three was in fact an exclusion on the basis of prejudicial entry. Maj. op. at 21 & n.13. I think it only fair to note, however, that the government did not cite these examples for the purpose of supporting its argument that prejudicial entry alone is sufficient to merit exclusion. They were invoked instead to support the wholly separate point, accepted by the majority, that damage to foreign policy interests has been considered "prejudicial to the public interest." *See* Brief for Appellees at 54.

Finally, the majority makes reference to the conflicting affidavits submitted by the parties. Maj. op. at 19. The affidavits of Lawrence S. Eagleburger, at the time the Under Secretary of State for Political Affairs, and Lewis Goelz, Deputy Assistant Secretary of State for Visa Services, support the government's position. J.A. at 138, 159-60. Plaintiffs have submitted the affidavit of Leonard Meeker, former Legal Adviser to the Department of State, which contradicts the position taken in the government's affidavits. J.A. at 250-52. Mr. Meeker's affidavit, however, offers an interpretation of subsection

As I have just noted, congressional acquiescence is unnecessary if the department's interpretation is reasonable. But the majority's position seems to me incorrect for a second reason. Addressing the issue of congressional acquiescence in *Haig* v. *Agee*, 453 U.S. 280 (1981), the Supreme Court noted that

> it would be anomalous to fault the Government because there were so few occasions to exercise the announced policy and practice. Although a pattern of

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(27) that the majority has in part explicitly rejected—specifically, that subsection (27) only authorizes denial of visas to "aliens whose anticipated activities in the United States would create dangers to this country of a gravity comparable to espionage and sabotage," such as "murder, mob violence or terrorism." J.A. at 251-52; *contra* maj. op. at 15-16. Such an interpretation is belied by the three specific examples of past exclusions decribed in the majority opinion, and would render subsection (27) entirely duplicative of subsection (29), which requires the exclusion of all aliens "with respect to whom the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security . . . ." An interpretation of subsection (27) that would render it superfluous, and therefore meaningless, is suspect. *See* 2A N. Singer, *Sutherland Statutory Construction* § 46.06 (Sands 4th ed. 1984). The fact that the majority has rejected the construction of "prejudicial to the public interest" that the Meeker affidavit claims was adopted by the executive branch in previous years does not, of course, mean that the majority cannot give any weight at all to the account in the affidavit of prior interpretations of "activities," since it was only the latter issue that the majority felt unable to resolve without resort to prior administrative interpretations. Nevertheless, it does cast some doubt on the validity and usefulness of the Meeker affidavit, and the extent to which it can be said to undermine the government's position sufficiently to make a remand necessary.

> actual enforcement is one indicator of Executive policy, it suffices that the Executive has "openly asserted" the power at isuse.

Id. at 303 (citation omitted). That open assertion is present, in this instance, in the State Department Manual, *see supra* note 2.[3] Further evidence of congressional acquiescence may be hard to come by. Congress has not recodified or reenacted the immigration statute since 1952. The district court is therefore expected to infer acquiescence simply from evidence of passive congressional awareness of an existing policy, without the affirmative indication of congressional approval implied by a reenactment of the same statute without relevant revisions. Moreover, government records relating to visa requests are required by law to be kept confidential. 8 U.S.C. § 1202(f) (1982). While records of three incidents of exclusions, cited by the majority, have become available—prompted by "Congressional inquiry or other public interest," Second Affidavit of Louis P. Goelz at 2, J.A. at 305—the overall policy is one of avoiding disclosure. Since Congress cannot acquiesce, or refuse to acquiesce, in a practice about which it is not generally informed, it is unlikely that the remand will produce any evidence more dispositive than that which is currently before us.

Even if the plaintiffs were able to demonstrate that their more narrow interpretation had governed Executive policy in prior years, they would still have to prove that it was an

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[3] The majority cites Kent v. Dulles, 357 U.S. 116, 128 (1958), in characterizing the evidence before us as evidence of "scattered rulings . . . not consistently of one pattern." In *Kent* v. *Dulles,* however, the Court justified that higher burden of proof placed on the government by reference to the difficult and important constitutional issues implicated by the government's policy. The plaintiffs before us, however, have not presented a single plausible constitutional argument. *See supra* Part IV.

interpretation in which Congress can be said to have acquiesced. This may be difficult. Subsection (27) allows the President broad discretion in deciding which admissions would be prejudicial. If the President in the past has not exercised the full measure of the authority he now claims to possess, the mere absence of an affirmative response by Congress proves very little. Acquiescence is more easily inferred when the Executive may have in the past *over*-reached, because that is the situation to which an objecting Congress is more likely to react, and in which inaction is more revealing. *See, e.g., Haig* v. *Agee*; *Dames & More* v. *Regan*, 453 U.S. 654 (1981).

Since I believe that a fair construction of the statute supports the reasonableness of the government's interpretation, and since I cannot see how the case could conceivably be resolved against the government if it failed to come forward with the "further examples" requested by the majority, maj. op. at 22, I dissent from the decision to remand.

III.

I have concerns as well with the majority's effort to distinguish subsections (27) and (28), and with its discussion of the McGovern Amendment. I agree that any interpretation of subsection (27) that renders subsection (28) superfluous and thereby nullifies the McGovern Amendment would be incorrect, and I agree as well that subsection (28) and therefore the McGovern Amendment are applicable when the mere fact of membership in an organization proscribed under subsection (28) is the only basis for exclusion. However, the majority has fashioned a rule that subsection (27) may be used only when the reason for exclusion is *independent of* the fact of membership. The McGovern Amendment does not require such a rule.

In order to appreciate the purpose behind the McGovern Amendment, it is necessary to understand the state of the law at the time of its enactment. Subsection

(28) then rendered anyone who was, or had been, a member of any anarchist, totalitarian, or communist organization ineligible for a visa, with the exception of those whose membership had been involuntary, those who had joined at a very young age, those who had joined in order to obtain food rations or other essentials, and those who had terminated their membership and actively opposed the doctrines of the organization for at least five years prior to the date of their application. Applicants who fell within one of these exceptions were not *per se* eligible, but could be admitted only if the consular official and the Attorney General determined that their admission would be "in the public interest." 8 U.S.C. § 1182(a)(28)(I) (1976). In addition to the blanket exclusion required by subsection (28), subsection (27) existed as it does today, and provided for additional exclusions.

An alien denied a non-immigrant visa under any but three of the thirty-three subsections of 8 U.S.C. § 1182(a) (1976) could, notwithstanding his initial ineligibility, be admitted into the country "in the discretion of the Attorney General" if he approved a recommendation to that effect by the Secretary of State or a consular officer. 8 U.S.C. § 1182(d)(3)(A) (1976). Subsection (28) was one of the thirty subsections to which this waiver provision was applicable, and it was this provision that the McGovern Amendment modified. The McGovern Amendment, as originally enacted, stated that "within 30 days of receiving an application for a non-immigrant visa by alien who is excludable . . . by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible," the Secretary of State should recommend to the Attorney General that the application be granted, unless national security concerns are implicated.

The McGovern Amendment was an expression of congressional disapproval of the statutorily-required blanket exclusion of virtually all people who were or had been

affiliated in some way with an organization of one of the named varieties. Prior to the enactment of the McGovern Amendment, the millions of people around the world who fell into one of the categories denominated by subsection (28) were automatically excluded, unless the Secretary of State and the Attorney General affirmatively decided otherwise. Individual decisions had to be made with respect to every applicant who would have been admitted into the country *but for* the fact that he belonged at some time to a named organization. The Senate Report accompanying the McGovern Amendment explained that it would have the effect of "open[ing] the way to visits by Eurocommunist leaders and to Communist labor leaders without the executive branch having to make the politically difficult individual decisions which might imply a change in overall U.S. policy toward Communism." S. Rep. No. 194, 95th Cong., 1st Sess. 13 (1977). *Accord* S. Rep. No. 842, 95th Cong., 2d Sess. 16-17 (1978) (describing visits by West European Communist leaders and Communist labor leaders as the "principal result" of the McGovern Amendment).

The McGovern Amendment applies only to Applicants who are "otherwise admissible to the United States," and was amended in 1978 to include the following statement:

> Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludable for reasons other than membership in or affiliation with a proscribed organization.

22 U.S.C. § 2691(a) (1982). As the 1977 Conference Report explained, the McGovern Amendment applies only to those excludable "*solely* because of membership in or affiliation with a proscribed organization." H.R. Rep. No. 537, 95th Cong., 1st Sess. 31 (1977) (emphasis added). In order to elaborate upon the meaning of phrases like "solely because of membership" and "otherwise admissible,"

and to prevent "evasion" of the McGovern Amendment, the majority has formulated a rule that requires the government to process visa applicants under subsection (28), rather than (27), unless the reason for exclusion is not merely *in addition to,* but *independent of,* the fact of membership. As elaborated upon in the majority opinion, this requirement apparently was met when the Borge application was denied, but calls into question the denials in the other cases. Because I believe that the McGovern Amendment clearly does not apply to any of the visa requests before us today, I feel compelled to explain my understanding of what the McGovern Amendment does and does not do, and why a requirement that the reason be independent of membership will deny the Executive authority that Congress intended it to have.

Subsection (28) was enacted by a Congress that wished to exclude as a general rule, all members of whatever level of participation in any communist, anarchist, or totalitarian organization. The presumption that all members of such groups, for that reason alone, ought to be excluded was rejected by the Congress that enacted the McGovern Amendment. But Thomas Borge, to take one of the cases before us, was not excluded because of membership in a communist party in Nicaragua. Borge is that country's Interior Minister and is one of the highest-ranking members of the Nicaraguan Cabinet. It was his *governmental* affiliation that triggered exclusion. Affidavit of Lawrence S. Eagleburger, J.A. at 141. Former Senator Pasti is an active participant in the World Peace Council, which the State Department believes to be an instrumentality of the Soviet government. *Id.* at 141-42. Olga Finlay and Leonor Rodriguez Lezcano are members of the Federation of Cuban Women which, according to the State Department, is controlled by the Cuban Communist Party. Their visa applications were submitted by the Cuban government, *id.* at 142, and Finlay has

represented the Cuban government on a United Nations Commission. Declaration of Ogla Finlay, J.A. at 215.[4]

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[4] In cases of this sort, plaintiffs may dispute the United States' view that visa applicants are participants in or affiliated with certain foreign governments. In this case, for example, Finlay and Lezcano, in affidavits filed below, deny that the Federation of Cuban Women is controlled by either the Cuban government or the Cuban Communist Party, J.A. at 216, 245, and the plaintiffs "deny that Mr. Nino Pasti participates in the World Peace Council as an 'instrumentality' of the Soviet government," and state that they "have no information bearing on the accuracy of this characterization for the Council itself." Plaintiffs' Statement of Genuine Issues at 4, J.A. at 175. If the majority means to suggest that these disputes are open to judicial resolution, *see* maj. op. at 6-7 n.2, then it is making an assumption I find extremely dubious, First, such questions, while containing elements of fact, are largely interpretive. Determining the point at which one institution's influence over another becomes "control" requires a series of policy decisions courts are unequipped, and unauthorized, to make. Second, even if such determinations *were* within our power and competence, they would require information that might well be too sensitive for the Executive to submit, even *in camera.* We do not possess, and cannot demand, all of the same detailed and confidential information at the disposal of the Executive. Indeed, even if we had that information, we would not have the surrounding knowledge of such things as the methods of communist operations and linkages to place the information in context. Courts cannot replicate the expertise of the Department of State and proceed to take over the Department's functions. Third, the actual issuance of judicial pronouncements on the questions of who is or is not an instrument of a foreign government, and the process of examination that would proceed them, carry the potential of significant disruption of our country's foreign policy.

In order to decide whether the Federation of Cuban Women, for example, is in fact "controlled" by the Cuban government, a court would presumably have to define the degree of influence necessary to constitute "control" and proceed to examine, through witnesses, documentary evidence, and public affidavits, if possible, the conflicting factual assertions and interpretive characterizations made by the private parties and the United States government. The court would wish to examine formal titles and organization charts, but would need in addition to analyze the more informal ways in which the Federation made its decisions and conducted its activities, to see if there existed a

According to the Eagleburger affidavit, "[t]he official, governmental nature of their proposed trip was clearly manifested both by the issuance to the two women of Cuban Diplomatic Passports and by the submission of their applications through diplomatic channels." Affidavit of Lawrence S. Eagleburger at 8, J.A. at 142. Unless governments can themselves qualify as "organizations" under subsection (28), affiliations with specific governments, even when through a subsection (28) organization, constitute grounds for exclusion separate from those found within subsection (28) itself. Relationships between our government and the governments of Nicaragua, the Soviet Union, and Cuba have been marked with tension. The diffuculties that characterize these relationships are not simply a function of the sort of generalized suspicion of communism that animated the near-absolute ban of subsection (28). I do not know whether the complexities of these government-to-government relationships ought properly to be characterized as "independent of," or merely "additional to," the adherence of these govern-

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veil that needed piercing. Indeed, the foreign governments themselves might wish to participate, and submit their own affidavits disavowing any connection with the visa applicants. Under the Act of State doctrine, we might well be precluded from reaching a decision contrary to the assertions contained in such affidavits, for we would be "inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964). A United States court ought not lightly undertake a role in which it must issue a public pronouncement that either the United States or a foreign government is untruthful about an issue of inter-governmental relations. Few exercises could be further outside the bounds of judicial competence, or more intrusive with respect to the conduct of foreign affairs. The United States' characterizations of the relationships between the visa applicants and foreign governments in this case cannot, therefore, be open to legal challenge.

ments to a communist ideology. I do know that nothing in the sparse legislative history surrounding passage of the McGovern Amendment warrants an extreme interpretation barring such factors from consideration. Such a reading is certainly not required in order to ensure that subsections (27) and (28) each retain an independent meaning. The best construction appears to be that subsection (28) applies when the sole ground for exclusion is membership in an organization of the sort described. When that membership raises addititional concerns, as it does when it involves a connection to a government that implicates American foreign policy, subsection (27) comes into play.

The distinction is real and important between a generalized congressional distrust of communist ideology and organizations and a specific Executive concern over admitting a particular person associated with a foreign government that the Executive considers in some respects adversarial to ours. The McGovern Amendment applies only to the former. That is suggested by the only two concrete examples of its application given in the legislative history—Eurocommunist leaders and Communist labor leaders. In fact, the State Department authorization bill passed in 1979 amended the McGovern Amendment to make clear that it did not apply to "representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state." 22 U.S.C. § 2691(b) (1982). As Congressman Solarz explained to his colleagues on the House floor:

> While [the McGovern Amendment] was very well intentioned, designed as it were to facilitate entry into the United States by a broad range of individuals, in practice it has resulted in a situation where a number of people have been admitted here who most of us, I think, do not believe should have been admitted to our country.

> I have in mind, for example, . . . the so-called leaders of purported labor unions in the Soviet Union and in other Communist countries of Eastern Europe who, whatever else they may be, cannot be considered genuine representatives of workers but are, rather, representatives of the State.

125 Cong. Rec. 8345 (1979). While the specific provision added dealt only with labor leaders, the understanding it reflected—that the status of applications by representatives of foreign governments were not to be affected by the McGovern Amendment, whatever the applicants' additional organizational affiliations might be—has broader application.

The majority in fact concedes that governmental affiliations qualify as legitimate grounds for the denial of a visa under subsection (27), and it is these affiliations that the defendants have consistently cited as the basis for denial in these cases. *See* Statement of Material Facts as to Which There is No Genuine Dispute at 5, 7, 9, J.A. at 128, 130, 132; Affidavit of Lawrence S. Eagleburger at 3, 7, 8, 9, J.A. at 137, 141, 142, 143.[5] The majority's quarrel with

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[5] I do not understand the reliance placed by the majority on the fact that previous visa requests by the same applicants have been granted, maj. op. at 29, for that in no way calls into question the legitimacy of the government's position. The defendants have not specified before us the reasons for granting the earlier requests because they were not at issue in these cases. In any event, we certainly ought not to require the government to come into court and justify each past visa decision in order to prove a pattern of integrity. That would involve courts in judging the reasonableness of this aspect of United States foreign policy, a task for which they are wholly unsuited. It is for the Executive, and not for courts, to determine when the relevant factors have changed, or when it is appropriate to change tactics even though circumstances remain the same. Additionally, requiring the Executive to justify a pattern of visa grants and denials would force the Department of State either to discuss highly sensitive matters in a public forum or to forego its authority to deny many visas. The denial of a

the defendants' position, therefore, is that the State Department has not advanced this rationale of government ties *independently* of organizational ties, but instead, in some of these cases, has found the nexus between the applicant's membership in subsection (28) organizations. Thus, even if officials of a foreign government acting in that capacity create an organization of the sort described in subsection (28), fund it with government revenues, choose its staff, and decide upon its activities and policies, members of that organization are nevertheless not sufficiently affiliated with the parent government to justify their exclusion under subsection (27). It would seem entirely rational for the State Department to conclude that a member of the Communist Party of the Soviet Union was affiliated with the government of that nation but that a member of the Communist Party of the United Kingdom was not affiliated with the government of his country. In the former case, party membership carries an *additional,* though not an *independent,* status. The requirement of an additional status—governmental affiliation—is quite enough to give meaning to the McGovern Amendment and to distinguish subsection (27) from subsection (28).

The majority's elevation of form over substance has no basis in the language or the legislative history of the McGovern Amendment, which are silent on the question of where subsection (28) leaves off and subsection (27) begins. The majority infers its rule of independence from a

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visa is not a declaration of war; it may be a reflection of any of a number of specific and unreported developments affecting relations between nations. Even in relationships long characterized by hostility, there are thaws and chills, conciliatory gestures and confrontational ones. The government is certainly not required to choose between denying all visa requests coming from one country or individual or none at all, and is certainly free to determine that reducing access without eliminating it entirely constitutes an appropriate and measured policy.

structural analysis; it seeks to ensure that (28) is not completely subsumed within (27). But unless the majority believes that every subsection (28) organization is an instrumentality of a foreign government whose representatives the United States will wish to exclude, subsection (28) remains intact and independent without the majority's rule. Without the McGovern Amendment, there would be a statutory policy to exclude all members of subsection (28) organizations; that policy has *not* been revived as the rationale of the decision we review. The McGovern Amendment is, therefore, in no danger of becoming a nullity.

The majority holds that regardless of any connection that might exist between a *particular* proscribed organization and a *particular* foreign government, the McGovern Amendment prohibits using the associational ties as a basis for exclusion. The McGovern Amendment therefore becomes peculiarly selective in its prohibition of guilt by association. If the World Peace Council were *not* a subsection (28) organization, and came to be viewed as an instrumentality of, for example, the Libyan government instead of the Soviet government, the McGovern Amendment would not apply and members of the Council could be excluded. While Congress' attitude toward the exclusion of Communists may have changed somewhat between 1952 and 1977, it is doubtful that the McGovern Amendment was meant to confer upon communists a favored entry status. But that is precisely what the majority opinion does. I believe the more logical reading of the McGovern Amendment is the more narrow one—that the McGovern Amendment sought to end the statutory policy of excluding *all* members of subsection (28) organizations automatically, when there was nothing more than the fact of membership as a basis. I do not believe the provision was meant to insulate members of those organiza-

tions—and only members of those organizations—from whatever additional grounds for exclusion their membership raised.

The majority's rule of independence is thus neither supported by the language or the legislative history of the McGovern Amendment nor reasonably inferable from the structure of the statutory scheme, and its application will lead to illogical and inconsistent results. This rule was apparently fashioned in part as a means of preventing the Executive from "evading" the limitations of the McGovern Amendment. I wish to note why, even were the majority's construction to be otherwise correct, the safeguard created may be toothless. First, it is at least an open question whether the terms of the McGovern Amendment are in fact mandatory. The State Department has apparently interpreted them to be, *see* Drischler letter (cited in maj. op. at 23), and there is legislative history to support this interpretation. *See* S. Rep. No. 842, 95th Cong., 2d Sess. 16 (1978) (one year after passage, describing McGovern Amendment as "mandating" favorable recommendation from Secretary of State). The provision itself, however, only declares that the Secretary "should" make a favorable recommendation, 22 U.S.C. §2691(a) (1982). In 1978, the Senate voted in favor of amending the provision to substitute the word "shall" for "should," but that revision was dropped at conference and the original language was retained. H.R. Rep. No. 1535, 95th Cong., 2d Sess. 44 (1978). In 1979, during a discussion on the House floor over proposed modifications of the McGovern Amendment, Congressman Solarz stated:

> Right now, under the McGovern amendment, the Secretary of State is obligated to recommend the waiver that they be admitted, unless he believes that admitting them would constitute a threat to the national security of the United States; and if he feels that they will not constitute a threat to the national security of the United States, he is obligated to recommend the waiver.

125 Cong. Rec. 8347 (1979). Congressman Fascell, Chairman of the Subcommittee on International Operations, responded:

> I just want to say that I agree with the explanation made by the gentleman from New York (Mr. Solarz), with one correction: The present language of the law, this is, the McGovern amendment, is not mandatory.
>
> Other than that, Mr. Chairman, I would agree with everything which the gentleman from New York has said.

Id. A bit later, Congressman Solarz indicated his agreement:

> If the gentleman will yield, I want to underline what the subcommittee chairman said, that the McGovern language is not mandatory. The Conferees went to a good deal of trouble to use the word "would," [sic] not "shall," . . . .

Id.

Second, even if the McGovern Amendment *is* mandatory, it requires only that the Secretary of State issue a favorable recommendation. Before the prohibition embodied in subsection (28) may be waived, that recommendation must be approved by the Attorney General, who has complete discretion not to do so. 8 U.S.C. § 1182 (d)(3) (1982). The Conference Report accompanying the McGovern Amendment expressly noted that "[t]his provision does not affect the authority of the Attorney General to deny waiver requests." H.R. Rep. No. 537, *supra,* at 32; *accord* S. Rep. No. 842, *supra,* at 17. The Attorney General is therefore not required to grant visas under subsection (28) to those applications which the Secretary of State is arguably required to support.

This fact has unfortunate consequences for the majority's reasoning. There are only two possibilities: that the Secretary of State and the Attorney General will behave disingenuously in order to evade the McGovern Amendment or that they will not.

As the majority indicates, maj. op. at 28 n.22, while the Attorney General retains the authority to decline to grant waivers for foreign policy reasons, it is unlikely that he would in fact make such determinations without guidance from the Secretary of State. Practically speaking, however, there is no way to prevent the Secretary of State from issuing a formal recommendation favoring admission, pursuant to his statutory duties as defined by this court, while also letting the Attorney General know that the granting of a waiver would prejudice the conduct of foreign affairs. Such behavior would render today's holding meaningless, but I can think of no way in which it could be policed. The majority suggests that its rule of independence is needed to ensure a mechanism for judicial review of a potentially disingenuous State Department. Maj. op. at 26-27 n.20. But since the Attorney General remains free to decline to grant the visa notwithstanding a favorable recommendation, and the Secretary of State is effectively able to urge him to do so, then, on the hypothesis of disingenuity, the majority's rule accomplishes nothing and is, therefore, unnecessary. The denial of a waiver remains "walled off from any effective challenge." *Id.*

I agree with the majority, however, that compliance with the McGovern Amendment, as now interpreted, is to be expected. We may anticipate that the State Department will adhere to the standard articulated today in all respects and will not take back in private the formal recommendations sent to the Attorney General, despite the fact that it possesses the power to do so. This is apparently the majority's expectation—in which case I am not at all certain why the mere fact that the State Department "possess[es] [the] power" to subvert the McGovern Amendment in other ways leads the majority to feel a prophylactic rule of sorts is necessary. Maj. op. at 26-27 n.20. It is puzzling that the majority posits both integrity and lack of integrity in the same Department in order to support different stages of its argument.

More importantly, if compliance with the spirit of its opinion is indeed the result the majority expects, it cannot claim that it has "preserve[d] the President's potency in this area." Maj. op. at 6-7 n.2. The majority supports that assertion by reference to the President's power, undisturbed by its opinion, to exclude aliens through the issuance of a Presidential Proclamation. However, if today's holding ultimately means that certain aliens may not be excluded save through such a proclamation, then the ability of the Executive to use the denial of visas for foreign policy purposes will be significantly diminished. In many instances, the use of a Presidential Proclamation would be diplomatic overkill and would lend an international importance to the person excluded that use of subsection (27) avoids. If such results are deemed unacceptable, many persons the Executive would like to exclude for good reasons will be allowed to enter, and he will be deprived of much of the flexibility and nuance that are essential in the conduct of foreign relations.

IV.

I am therefore left with plaintiffs' constitutional challenges. The statutory issues are somewhat complex; the constitutional issues are not. The Supreme Court precedent is clear and consistent.

Plaintiffs do not assert that the four unsuccessful visa applicants have any constitutional right to enter the United States. Instead, they assert their own rights, as listeners, to receive information. Such interests have been held to "implicate[]" first amendment rights and thus to confer standing in cases such as these. *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972). It is clear, however, that a potential listener who seeks a judicial declaration that the government's decision to exclude an alien is unconstitutional bears a difficult burden. That must be so if the right to listen, which *Kleindienst* recognizes, is not to destroy

the United States' sovereign power to control entry into its territory. The first amendment, it must be remembered, does not protect only speech uttered in a lecture hall or an auditorium, and the interest in receiving information can be asserted by any individual in this country who wishes to speak with an alien. *See id.* at 768. Because the exclusion of aliens remains "a fundamental act of sovereignty," *Knauff* v. *Shaughnessy,* 338 U.S. at 542, the Supreme Court has held

> that when the Executive exercises this power . . . on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Kleindienst v. *Mandel,* 408 U.S. at 770.

In support of their first amendment argument, plaintiffs cite approximately twenty Supreme Court decisions, only one of which, however, deals with constitutional review of immigration law. There is in fact an unbroken line of decisions limiting the scope of judicial review in this area, of which *Kleindienst* is only one of the more recent. The Supreme Court has repeatedly held that the power to exclude aliens is "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *Mezei,* 345 U.S. 206, 210 (1953). *Accord Regan* v. *Wald,* 104 S.Ct. 3026, 3039 (1984); *Fiallo* v. *Bell,* 430 U.S. 787, 792 (1977); *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 589 (1952); *see also Galvan* v. *Press,* 347 U.S. 522, 531 (1954) ("that the formulation of [immigration] policies is entrusted to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government").

Plaintiffs' primary legal claim is that the first amendment forbids the Executive from making decisions to exclude based on the content of an applicant's political

beliefs. Such an assertion is wrong as a matter of law, and irrelevant to the case at bar. It is wrong as a matter of law because it describes the lower court holding *reversed* by the Supreme Court in *Kleindienst* v. *Mandel. Mandel* v. *Mtichell,* 325 F. Supp. 620 (E.D.N.Y. 1971) (three-judge court). In upholding the refusal of the Attorney General to grant a waiver to Mandel from the mandatory exclusion of subsection (28), the *Kleindienst* Court necessarily upheld the consitutionality of the exclusion of communists required by subsection (28)—indisputably an exclusion based upon Mandel's political beliefs.

In any event, plaintiffs' characterization of the government's conduct in these cases is simply inaccurate. The government does not here enforce a policy of making decisions to exclude based on the content of applicants' political beliefs, but has instead chosen to exclude applicants who are members of or connected with particular foreign governments. By wrongly equating the two policies, plaintiffs mischaracterize the United States' action as "content-based censorship." Brief for Appellants at 56. Even if that were correct, as I have already shown, plaintiffs would not automatically prevail in the legal context of visa denials. It is idle to pretend that the United States is attempting to prevent certain ideas from reaching the American people. Those ideas are part of our domestic and international political discourse and their expression in this country is fully protected by the first amendment. *Kliendienst* demonstrates that the additional right to have particular aliens come here to express those ideas is limited by our government's plenary power over the admission of aliens. But, in any case, plaintiffs' description of what is taking place here is wrong. The existence of ideological differences between the United States and a foreign government does not mean that a denial of visas to persons affiliated with that government is an exclusion resting solely on the content of the applicants' political beliefs. Classifications of the sort involved here have been upheld in the past against first amendment challenges. *Zemel* v.

Rusk, 381 U.S. 1 (1965), upheld restrictions on travel by American citizens to Cuba. Preventing Americans from travelling to a foreign country is certainly not less serious constitutionally than preventing that country's citizens from coming here. The government's actions at issue in these cases obviously withstand the limited judicial scrutiny defined by the *Kleindienst* standard.

Plaintiffs briefly offer one other constitutional argument—that the board discretion delegated to the Executive in subsection (27) violates principles of separation of powers. Plaintiffs have chosen an especially inhospitable legal environment in which to attempt the resuscitation of the non-delegation doctrine, for it is in the context of foreign affairs that the Supreme Court has repeatedly upheld the legitimacy of broad and discretionary Executive power. "[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature," statutes conferring authority upon the President to conduct foreign affairs have necessarily been less detailed and specific than statutes concerned with domestic affairs. *Zemel* v. *Rusk,* 381 U.S. at 17. *See supra* Part II, and cases cited there. This constitutional argument is therefore no more substantial than plaintiffs' first amendment claim.

V.

In an affidavit filed below, Under Secretary Eagleburger stated:

> The overwhelming majority of NIV applications involve only ordinary circumstances of aliens seeking to visit the United States for reasons of business or pleasure. However, in some instances, the issuance, denial or revocation of a NIV to a particular alien can have significant diplomatic or foreign policy ramifications to the extent that the issuance or denial is construed as an act of the United States Government.

> Thus, for example, the issuance or denial of a visa to a foreign government official may be taken by the alien's government as a reflection of United States foreign policy vis-a-vis that government and may result in reciprocal action or retaliation by that government. Similarly, the denial of visas to foreign government officials is one of the tools available to a government to communicate its attitude about the policies of other states.

J.A. at 137. This description of State Department policy is compatible with the statutes governing the issuance of non-immigrant visas, statutes which are constitutional under all applicable Supreme Court precedent. In the area of immigration law, "interwoven" as it is with "the conduct of foreign relations," *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 588-89 (1952), Congress has traditionally delegated—and the courts have respected—broad and discretionary Executive authority.

The majority's opinion is a cautious one: major issues presented in this litigation are left for subsequent resolution. Yet that virtue seems to me inadequate. The majority's constricted method of statutory construction, which is inconsistent with *Chevron,* its insufficient appreciation of the weight to be accorded the context of foreign policy in which this case arises, and its lack of deference to the determinations of the Department of State combine to produce an unnecessary remand. They seem likely ultimately to produce an incorrect and unfortunate result in this litigation. By itself that may not be very serious, although we have no way of knowing, but today's approach is capable of creating a series of similarly unfortunate results in other cases implicating foreign policy. If the approach employed here is repeated, then the majority opinion begins, albeit cautiously, a process of judicial incursion into the United States' conduct of its foreign affairs. For that reason, and because I believe that the law and the public record before us require affirmance of the district court's grant of summary judgment, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3739

JAMES ABOUREZK, ET AL., PLAINTIFFS

v.

RONALD WILSON REAGAN, ET AL., DEFENDANTS

Civil Action No. 83-3741

CITY OF NEW YORK, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS

Civil Action No. 83-3895

BRUCE CRONIN, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS

[Filed July 27, 1984]

OPINION

These cases present the question whether the Secretary of State[1] is required to issue visas to aliens whom plaintiffs—citizens and residents of the United States—have in-

[1] The Secretary of State and the Attorney General both have responsibilities concerning the admission of aliens. See 8 U.S.C. § 1103, 1104. These cases involve primarily the powers and responsibilities of the Secretary.

vited to come to the United States for the purpose of associating with them and hearing them speak on issues of public concern.

While there are a number of subsidiary questions in these cases, the legal issue which ultimately governs is relatively straightforward. In *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the Supreme Court decided that, in view of the broad authority vested by the Constitution in the Congress and the Executive over the admission of aliens and the conduct of foreign affairs, the Judiciary may do no more, in circumstances such as these, than to inquire whether the government has provided a "facially legitimate" explanation for its refusal to permit an alien to enter. If such an explanation is given, a court is not free to question the underlying policy or the wisdom the decision, but it must defer to the political branches. As discussed below, facially legitimate reasons have been provided here, and the decision of the Secretary will therefore be upheld.

I

Abourezk (C.A. No. 83-3739) involves an invitation extended by several of the plaintiffs to Tomas Borge, Interior Minister of Nicaragua, to come to the United States for various purposes. Some of the plaintiffs state they wish Mr. Borge to engage in a five-day speaking tour; others, who are members of Congress, assert that they want to meet with Mr. Borge privately to gain his perspective on Central American affairs; still others, who are journalists, claim that they intend to interview Mr. Borge; and several university professors allege that they wish to have Mr. Borge speak at a university or before religious groups.

Cronin (C.A. No. 83-3895) involves an invitation extended to Nino Pasti, a former member of the Italian Senate and of the Italian armed forces, and the present

president of an organization named Lotte per la Pace (Struggle for Peace). According to the Department of State, Mr. Pasti is also an active participant in the activities of World Peace Council, an instrumentality of the Soviet government. Mr. Pasti was invited to speak at one or more rallies sponsored by two organizations—the Mobilization for Survival and the New England Campaign to Stop the Euromissiles—which are seeking to change United States nuclear policies through public demonstrations and other means.

City of New York (C.A. No. 83-3741) involves an invitation extended by the Commission on the Status of Women, a New York City agency, to Olga Finlay and Leonor Rodriguez Lezcano, two Cuban women, who are said by plaintiffs to have special expertise on the status of women in Cuba. According to the government, both are members of the Federation of Cuban Women, an instrumentality of the Cuban Communist Party. Ms. Finlay and Ms. Lezcano were invited to come to the United States to speak in New York City, at several universities across the country, and at such organizations as the Third World Women's Project, and the Committee on Religion, Ethics, and Social policy.

Each of the invited aliens applied for a visa[2] at the appropriate American consulate or embassy.[3] Because the applications involved possible denials for foreign policy reasons, they were forwarded for review to the Assistant Secretary of State for Consular Affairs in Washington, in

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[2] It appears that Mr. Borge had on a previous occasion applied for and been granted a visa which he never used. Mr. Pasti had also previously been granted visas some of which he used for travel in the United States and at least one of which he did not use. Ms. Lezcano had not previously sought a visa, but Ms. Finlay had sought and obtained visas on prior occasions.

[3] The visas for Ms. Finlay and Ms. Lezcano were submitted by the Cuban Ministry of Foreign Relations on their behalf by a diplomatic note to the United States consular officer in Havana.

accordance with standing instructions,[4] and at least some of them were also reviewed by then Under Secretary of State Lawrence Eagleburger. Eventually, the consular officers were instructed by the Department of State that the entry and the proposed activities of the aliens would prejudice the conduct of United States foreign affairs, and that the visas were to be denied pursuant to section 212(a)(27) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1182(a)(27) (hereinafter referred to as subsection (27)). The alien applicants were informed accordingly.

These actions followed. Presently pending before the Court is the government's motion for summary judgment.

II

Plaintiffs do not contend that either the Constitution or any law grants to the invited aliens[5] the right to enter the United States. As indicated *infra,* such an argument would lack validity in any event. Rather, the claim is that the American plaintiffs were deprived of their rights under the First Amendment and under the Immigration and Nationality Act when they were denied the opportunity to associate with their invitees and to hear their speech in this country. Before examining these claims in detail, it is helpful to consider first the *Kleindienst* case *supra,* which resolves many of the issues underlying plaintiffs' claims.

In *Kleindienst,* Ernest E. Mandel, a Belgian journalist and editor, was invited by a graduate student association at Stanford University[6] to participate in a conference on Technology and the Third World and thereafter to lecture at other major universities and conferences. Section

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[4] Foreign Affairs Manual, vol. 9 (Visa T1-880, ¶1).

[5] An "alien" is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(3).

[6] The University itself endorsed the invitation.

212(a)(28) of the Act excludes from the United States, among others, aliens who advocate communism or the establishment in the United States of a totalitarian dictatorship, and Mr. Mandel apparently was excludable as being in that category. Unlike the ban in subsection (27), that in subsection (28) may be waived by the Attorney General upon the recommendation of the Department of State.[7] No waiver was granted, and Mr. Mandel's application for a visa was rejected.

In the *Kleindienst* suit, the alien's sponsors made many of the same arguments that are advanced by the plaintiffs in this action. The Supreme Court sustained some of these contentions, and it rejected others. Thus, the Court held that an alien invitee has no personal constitutional right to enter this country; that insofar as his sponsors are concerned, they have a right under the Constitution not only to dissiminate information and ideas but also to receive them; and that the possible availability of alternative means of receiving information and ideas (*e.g.*, telephone hook-ups, tapes, visits to a foreign country) does not extinguish or displace altogether this constitutional right.

Having said that, the Court, after reiterating the familiar rule that Congress has plenary power over the admission of aliens, went on to hold that the First Amendment rights of individuals who wish to meet and speak with an alien do not necessarily override the power of the Executive, delegated by Congress, to deny waivers of the subsection (28) prohibition. Finally, the Court stated that:

> Appellees seek to soften the impact of this analysis by arguing . . . that the First Amendment claim should prevail, at least where no justification is advanced for denial of a waiver. . . . The Government would have us reach this question, urging a broad decision that Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any

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[7] See 8 U.S.C. § 212(d)(3)(A).

> reason or no reason may be given. . . . This record, however, does not require that we do so, for the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver. And that reason was facially legitimate and bona fide.[8]

408 U.S. at 769.

The instant cases do not permit a decision based on the precise *Kleindienst* factors,[9] and the Court must therefore decide whether the Department of State has given a "facially legitimate and bona fide" reason for denying visas to the aliens who sought entry here.

III

All three cases present two basic questions[10] – the mean-

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[8] The reason given was that the alien had abused visas previously granted to him by going beyond the stated purposes of his trip.

[9] None of the four aliens here involved has a record of abuse of visas.

[10] The government also argues that the Court lacks subject matter jurisdiction, that plaintiffs have no standing to sue, and that the complaint fails to state a claim upon which relief may be granted. Plaintiffs, for their part, assert that the case is not ripe for summary judgment because there are contested issues of fact. The Court rejects all these arguments.

The Supreme Court in *Kleindienst* considered the merits of the claim without discussing any of the preliminary issues here raised by the government – which it presumably would not have done had it had doubts about such matters as jurisdiction or standing.

In any event, courts have frequently exercised subject matter jurisdiction where it was alleged that First Amendment violations had occurred in the administration of the Immigration Act (see *e.g., Fiallo* v. *Bell*, 430 U.S. 787 (1977); *Burrafato* v. *Department of State*, 523 F.2d 554, 556 (2d Cir. 1975)), and they have likewise found jurisdiction where a citizen claimed misapplication of the Act with respect to an alien with whom he had some relationship. See, *e.g., Karmali* v. *INS*, 707 F.2d 408 (9th Cir. 1983); *Acosta* v. *Gaffney*, 558 F.2d 1153 (3rd Cir. 1977); *Pesikoff* v. *Secretary of Labor*, 501 F.2d 757 (D.C. Cir. 1974). Such 19th century decisions as *The Chinese Exclusion Cases*,

ing of subsection (27) and the constitutionality of the

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130 U.S. 581 (1884), upon which the government relies, have largely been ignored in favor of a more enlightened jurisprudence. It should also be noted that the decision here was made not by a consular official stationed abroad but by high-level State Department officials pursuant to general guidelines. Thus, decisions which have refused to consider discretionary determinations of consuls (*e.g.*, Gomez v. *Kissinger*, 534 F.2d 518 (2d Cir. 1976)) have only limited application.

Many of the cases which have upheld jurisdiction in these circumstances also support plaintiffs' position on standing. See *Fiallo* v. *Bell, supra; Burrafato* v. *Department of State, supra; Pesikoff* v. *Secretary of State, supra.* Plaintiffs have suffered injury-in-fact and that injury is not vitiated merely because it may be shared by many others. See *Heckler* v. *Mathews*, 104 S.Ct. 1387 (1983); *Lamont* v. *Postmaster General, 381 U.S. 301 (1965).* The cited cases also dispose of the government contention that plaintiffs are not within the zone of interests regulated by the statute or by the First Amendment. *See also, Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978).

As for the government's assertion that the complaint does not state a claim upon which relief may be granted, the only arguments seriously pressed are mootness and ripeness. However, in view of the government's broad defense of its actions, plaintiffs have every reason to fear that the allegedly unlawful activity will continue. See *Kolendar* v. *Lawson*, 103 S.Ct. 1855 (1983); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911). It may well be that American citizen standing would be lacking if there were not a reasonable nexus between them and a particular alien invitee. However, that is not so here.

Plaintiffs, as indicated, argue that these cases are not ripe for summary judgment. However, none of the factual issues they raise (whether subsection (27) has been used in the past to exclude aliens on foreign policy grounds, whether the government's actions are a strategem to escape congressional restrictions on subsection (28), whether the content of the aliens' speech and their political beliefs played a role in the Executive's decision to exclude them, and whether the foreign policy concerns asserted are of sufficient magnitude) represents a genuine issue of material fact. To the extent that these questions are not irrelevant, they represent issues of law or policy, or they are resolved by the Eagleburger *in camera* affidavits. See Part V infra.

government's actions.[11] These will now be examined in turn.

Subsection (27) provides that members of the following class of aliens are ineligible to receive visas:

> Aliens who the consular officer . . . knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety or security of the United States.

Plaintiffs raise two statutory construction points apart from their First Amendment claims.

First. Plaintiffs contend that subsection (27) speaks only of an alien's *activities* which might jeopardize the public interest or security, in contradistinction to aliens whose *entry or presence* in this country might have such an effect. In that view, the government may not, under that subsection, exclude an alien unless there is some reason to believe that he will engage in offensive *conduct*. To put it another way, plaintiffs argue that the statute does not permit the Department of State to exclude an alien whose conduct is presumed to be benign but whose presence alone in this country is regarded as prejudicial to the public interest interest, welfare, or security of the United States.

On a strictly textual basis, that contention is not unpersuasive, for the statutory provision mentions only "activities." However, in this context at least, the distinction between an alien's activities and his presence in the United

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[11] Plaintiffs argue that if the government's construction of the statute is correct, it is unconstitutional under the First Amendment; or, in the alternative, that it should be construed narrowly to avoid an unconstitutional result. In the present context, the considerations governing these alternative contentions do not differ materially, and the two arguments will therefore be considered together. See Part IV *infra*.

States is one without a difference. The best proof of that proposition is the case of the former Shah of Iran. The mere entry of the Shah into the United States and his presence in this country had the most serious consequences for the United States, including the seizure of American hostages in Teheran and all that flowed from that episode, including ultimately the loss of life in connection with the abortive rescue operation.[12] It is thus not surprising that the Executive, in construing subsection (27), has not made the distinction plaintiffs ask the Court to draw. Moreover, in the one decision that addressed this issue—*El-Werfalli* v. *Smith*, 547 F. Supp. 152 (S.D.N.Y. 1982)—the court concluded that the mere presence of an alien in the United States was sufficient to trigger the subsection (27) prohibition even though the government did not suggest that he would engage in any offensive activities while here.[13]

Second. Plaintiffs argue next that the thrust of subsection (27) is to ensure the safety and security of the United States, and that an alien may therefore not be denied entry for foreign policy reasons and objectives which, according to plaintiffs, fall in a different category. That argument ignores a substantial part of the statute; *i.e.*, its reference to activities which may be prejudicial to the "public interest" and to those which might endanger the "welfare" of the United States. Leaving to one side the question whether these terms are so vague and broad that

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[12] Needless to say, the Court has neither the authority nor the ability to determine whether that policy decision was the proper one under the circumstances. All that it considers here is that the Shah's presence in this country had substantial consequences in terms of the public interest and the security of the United States. Whether the consequences in that or in future cases outweigh other considerations (*e.g.*, the earlier cooperation of the Shah with the United States), is a decision for the President and his subordinate officers, not for a court or a private citizen.

[13] El-Werfalli was a Lybian national who sought to enter the United States solely to attend school.

they lend themselves to the suppression of speech that the government finds inconvenient (see note 19 *infra*), it is clear that the statutory terms embrace harm to foreign policy interests if they mean anything beyond strictly domestic security concerns. Moreover, it appears that the statute has consistently been so interpreted ever since the Immigration and Nationality Act was enacted in 1952, by several different Administrations of both political parties.[14] See also, *Haig* v. *Agee*, 453 U.S. 280 (1981); *United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 719 (1975).

These conclusions are not undermined by the so-called McGovern Amendment.[15] As indicated, subsection (28) excludes from the United States aliens with communist affiliations, but it goes on to vest authority in the Attorney General to waive that restriction. While that official has apparently exercised his waiver authority on numerous occasions, he refused several waivers for foreign policy reasons. The McGovern Amendment directed the Attorney General not to exercise his waiver authority on this basis,[16] and plaintiffs deduce from that legislative action that foreign policy interests may not be considered under the Immigration and Nationality Act. However, subsection (27) is a much more closely targeted, narrow provision than is subsection (28) and, as indicated below,[17] it has been used only a few dozen times each year. More-

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[14] Congress was advised of the exclusion for policy reasons of Thomas Liaou, an advocate of Formosan independence (1958, 1961, 1962); Otto Skorzeny, a former Nazi SS officer (1959), and Mme. Ngo Dinh Nhu, sister-in-law of the former prime minister of Vietnam (1964).

[15] P.L. 95-105, 91 Stat. 848 (1977), 22 U.S.C. § 2691.

[16] Under the amendment, the Attorney General may deny waivers only with respect to aliens who pose a threat to United States "security interests."

[17] See note 26 *infra*.

over, as stated above, unlike subsection (28), the provision under consideration here does not authorize waivers at all, but it provides instead that an alien in the excludable class "shall" be ineligible for admission to the United States.

It is, of course, sometimes difficult to know precisely what the Congress intended, and the present situation is no exception. It may be that, by explicitly prohibiting the practice of denying subsection (28) waivers for foreign policy reasons, Congress meant to signal the Executive not to consider such reasons at all in its exclusion policy; or it may be that, by confining its prohibition to subsection (28), it did not intend to disturb the Executive's long-standing policy and practice of using subsection (27) for foreign policy reasons in addition to other reasons that may be encompassed under "public interest" or "welfare . . . of the United States." In view of the substantial independent authority the Executive possesses in the fields of foreign relations and the admission of aliens, the Court would not be justified in interpreting the congressional action with respect to subsection (28) as a prohibition on Executive power generally unless the expression of legislative intent were far more clear than it is in this instance.

For these reasons, the Court concludes that, on its face, the statute sanctions the denial of the visas at issue here.

IV

There are, of course, significant First Amendment implications to the statute. The Supreme Court has held that the First Amendment protects not only speech but also the right to receive information and ideas.[18] These plaintiffs claim accordingly that they are entitled to have the invited aliens enter the United States because they wish to exercise

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[18] In addition to *Kleindienst* v. *Mandel, supra,* see *Procunier* v. *Martinez,* 416 U.S. 396 (1974); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 386-90 (1969); *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969); *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965).

that right.[19] It is not an answer to say—as the government does—that there are alternative means (mails, television, travel abroad) to receive the message of these aliens, for as the Court said in *Kleindienst,*

> we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutinal interest on the part of the appellees in this particular form of access.

408 U.S. at 765.[20]

However, it is also clear that consideration of the First Amendment does not end the inquiry, for the interest of citizens in being the beneficiaries of ideas from others must be considered in juxtaposition to the authority of the Congress and the Executive to regulate and conduct foreign relations. Moreover, under *Kleindienst,* where the basis for the visa denial bottomed on that authority is "facially legitimate and bona fide," the courts' role is at an end: they must defer to the Executive decision.

The government argues that, by its submission of Under Secretary Eagleburger's affidavit, it has provided a facially legitimate, bona fide basis for refusing entry to the four aliens. However, that affidavit it entirely conclusory; it states only that the entry of the particular aliens "would have been prejudicial to the conduct of the foreign affairs of the United States." Such conclusory statements might be adequate under some circumstances; they are not here.

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[19] Plaintiffs also claim that, as construed by the Department of State, subsection (27) is overly broad and void for vagueness. But in foreign affairs matters and those involving the admission of aliens, the political branches have the widest possible latitude in these respects. See *Dames & Moore* v. *Regan,* 453 U.S. 654, 678-79 (1981). It appears that no immigration statute has ever been invalidated on such grounds.

[20] At least as to Ms. Finlay and Mr. Lezcano, there is doubt whether their American sponsors could visit them in Cuba. See *Regan* v. *Wald,* ___U.S. ___ *(June 28, 1984); Zemel* v. *Rusk,* 381 U.S. 1 (1965).

In the absence of additional details, it could reasonably be concluded that the Department of State denied visas to these alien applicants because it did not agree with or feared the content of whatever communication they might make while in this country.[21] This conclusion would be especially relevant in these cases where the visa denials were defended, at least in part, on the ground that the Department of State considered the aliens' proposed "activities" in the United States to be prejudicial—yet the only activities that had been planned were protected speech and association.[22]

In the view of the Court, an alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded under subsection (27) solely on account of the content of his proposed message. For although the government may deny entry to aliens altogether, or for any number of specific reasons, it may not, consistent with the First Amendment, deny entry solely on account of the content of speech. *Regan* v. *Time, Inc.*, 52 U.S.L.W. 5084 (July 3, 1984); *Heffron* v. *International Society,* 452 U.S. 640, 648 (1981); *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95-96 (1972).[23]

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[21] The *Kleindienst* reason, by contrast, was susceptible of objective inquiry and verification. See note 8 *supra.* See also, *El-Warfalli* v. *Smith, supra* 549 F. Supp. at 153-54.

[22] The term "public interest" in Subsection (27), standing alone, could be construed to permit the denial of a visa solely because the applicant might, once here, speak in opposition to the foreign policy interests of the government, the presumed theory being that the government's policy may be equated with the public interest. Indeed, government counsel asserted that unpalatable speech would be a valid reason for exclusion. It should be noted, however, that Under Secretary Eagleburger averred that he was "aware of no instance in which a [non-immigrant visa] request has been denied for reasons of foreign policy simply because the applicant was critical of our policies and objectives."

[23] Special circumstances may permit an exception to this rule. For example, an alien could probably validly be excluded if he is not mere-

For these reasons, the Court rejects both the argument of plaintiffs that the government lacks the power to exclude pursuant to subsection (27) unless it can be shown that there will be a direct threat to national security, and that of the government that incantation of the phrase "foreign policy objectives" is sufficient to end the Court's inquiry. Plaintiffs' theory, if adopted, would not adequately protect the national interest in its foreign relations; the government's theory would allow it to exercise its foreign relations power so as to keep the content of speech from American citizens.

In view of these holdings, the specific reasons for the exclusion of these four aliens thus assume paramount importance and that issue, as discussed below, requires the Court to consider the classified affidavits submitted by the government.

V

The government has offered for the Court's *in camera* inspection a classified affidavit of Under Secretary Eagleburger with respect to each of the three cases. Plaintiffs object to such an inspection, arguing that they have the right to view these affidavits and to contest the facts and conclusions they contain. It thus becomes necessary, initially, to determine whether the Court should avail itself of the Department's offer to review the Eagleburger affidavits on this basis.[24]

While consideration of documents outside the usual adversary process is certainly not desirable,[25] the Court

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ly a citizen but a high official of a foreign nation whom the Executive could exclude or expel as *persona non grata* on any basis whatever. See 8 U.S.C. § 1102; H. Rep. No. 1365, 82d Cong., 2d Sess. 34 (1952).

[24] On July 5, 1984, the Court issued an order for the submission of the affidavits without prejudice to either party's position on the *in camera* inspection issue.

[25] However, because classified documents are involved, this kind of

has concluded that the alternatives to such consideration are even more unpalatable. The Court has already held that the particular visa denials involved here could not be upheld on the basis of the open record alone. To find the conclusory statement that the entry of a particular individual would be contrary to United States foreign policy objectives to be a "facially legitimate reason would be to surrender to the Executive total discretion even in cases such as these where it is claimed—and the claim is not implausible—that entry is being denied solely on account of the content of the alien's proposed speech. Moreover, judicial scrutiny of the specific reasons for denials of entry will have the beneficial effect of preventing both a mushrooming of exclusions based on the provision here at issue[26] and content-based denials.[27]

Equally unsatisfactory is the solution proposed by plaintiffs: to disregard the *in camera* affidavits, at least unless they are subjected to the full adversary process. The affidavits in this case—and presumably in future cases—are both classified and highly sensitive, and they therefore could not be subjected to that process. At the same time, the Court would not be justified in overruling the Secretary's decision merely because the specific reasons therefor cannot be made public. To do so would be to run afoul of the Supreme Court's mandate in *Kleindienst* that the

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procedure is not unusual. See *Hayden* v. *National Security Agency*, 608 F.2d 1381 (D.C. Cir. 1979); *Phillippi* v. *Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir.1976).

[26] The Department asserts that, until now, of the millions of non-immigrant visas sought every year, the total number denied pursuant to subsection (27) for each of the last ten years has ranged from sixteen (FY75 and FY80) to sixty-three (FY76). During the last twenty years, almost 70 million non-immigrant visas were issued, and 519 were denied under subsection (27). Affidavit of Deputy Assistant Secretary of State Louis P. Goelz.

[27] The mere existence of judicial scrutiny, albeit in an *in camera* setting, is likely to have a deterrent effect in this regard.

courts must defer to the political branches where the reasons for the denials are bona fide on their face.[28]

The Court has accordingly reviewed the Eagleburger affidavits *in camera*. On the basis of that review, it has concluded that facially legitimate reasons exist for denying visas to the four individuals whose entry is being sought in these actions. Essentially, these applicants were not denied entry because of the content of the expected speeches, but because of their personal status as officials of governments or organizations which are hostile to the United States. According to Under Secretary Eagleburger, some of these entities are desirous of acquiring legitimacy and respectability, and the admission of their officials to the United States would further that goal;[29] while others operate under false pretenses insofar as they claim to be independent of hostile powers. Under *Kleindienst*, and indeed because of the limited role of the Judiciary with respect to foreign relations generally, the Court is required to accept as valid the judgment of the Executive Branch that the foreign affairs of the United States would, in fact, be injured by the admission of aliens possessing these characteristics. Clearly, the reasons provided by the Executive are "facially legitimate." The government's motion for summary judgment will therefore be granted.

/s/ HAROLD H. GREENE
United States District Judge

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[28] In *El-Warfalli* v. *Smith, supra*, the Court considered classified information, and the Court is advised that the U.S. District Court for the District of Massachusetts, where an action similar to these is pending, has likewise agreed to consider a classified affidavit *in camera*. *Allende* v. *Schultz*, No. 83-3984-C.

[29] Plaintiffs argue that alternative means may be available for denying legitimacy to hostile individuals or organizations (*e.g.*, by advising foreign governments that admission based on First Amendment considerations does not imply endorsement by the United States). Neither the Court nor plaintiffs are empowered to make such foreign policy judgments.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3739

JAMES ABOUREZK, ET AL., PLAINTIFFS

v.

RONALD W. REAGAN, ET AL., DEFENDANTS

Civil Action No. 83-3741

CITY OF NEW YORK, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS

Civil Action No. 83-3895

BRUCE CRONIN, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS

[Filed July 27, 1984]

ORDER

For the reasons stated in the Opinion filed this date, it is this 27th day of July, 1984,

ORDERED That defendant's motion for summary judgment be and it is hereby granted, and it is further

ORDERED That these actions be and they are hereby dismissed.

/s/ HAROLD H. GREENE
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5673
Civil Action No. 83-03739

JAMES ABOUREZK, ET AL., APPELLANTS

v.

RONALD WILSON REAGAN, PRESIDENT OF THE
UNITED STATES, ET AL.,

No. 84-5681
Civil Action No. 83-03741

CITY OF NEW YORK, ET AL., APPELLANTS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.,

No. 84-5708
Civil Action No. 83-03895

BRUCE CRONIN, ET AL., APPELLANTS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.,
DEFENDANTS

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

JUDGMENT

Before: EDWARDS, GINSBURG, and BORK, Circuit Judges.

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby vacated and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: March 11, 1986
Opinion for the Court filed by Circuit Judge Ginsburg.
Dissenting opinion filed by Circuit Judge Bork.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5673
CA No. 83-03739

JAMES ABOUREZK, ET AL.

v.

RONALD W. REAGAN, PRESIDENT OF THE
UNITED STATES, ET AL., AND CONSOLIDATED CASES

[Filed May 23, 1986]

BEFORE: Edwards, Ginsburg, and Bork, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
For The Court
GEORGE A. FISHER,
CLERK

By: /s/ ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Bork would grant the petition for rehearing.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5673
CA No. 83-03739

JAMES ABOUREZK, ET AL.

v.

RONALD W. REAGAN, PRESIDENT OF THE
UNITED STATES, ET AL., AND CONSOLIDATED CASES

[Filed May 23, 1986]

BEFORE: Robinson, Chief Judge; Wright, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia, Starr, Silberman and Buckley, Circuit Judges

ORDER

Appellees' suggestion for rehearing *en banc,* has been circulated to the full court. A vote was requested but a majority of judges in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc,* that the suggestion for rehearing *en banc* is denied.

Per Curiam
For The Court
GEORGE A. FISHER,
CLERK

By: /s/ ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Bork, Scalia, Starr, Silberman and Buckley would grant the suggestion for rehearing *en banc.*

Circuit Judges Wright and Mikva did not participate in this order.

APPENDIX G

AFFIDAVIT OF LAWRENCE S. EAGLEBURGER

I, LAWRENCE S. EAGLEBURGER, depose and say as follows:

1. I presently serve as the Under Secretary of State for Political Affairs. I have previously provided unclassified testimony in the above-captioned matter, which concerns the November, 1983, denial of an application on behalf of Nicaraguan Interior Minister Tomas Borge (hereinafter, "Borge") for a nonimmigrant visa (hereinafter, "NIV"), and offer the following in supplementation thereof.

2. I am familiar with the facts and circumstances pertinent to the denial of the NIV in question, and provide this additional *in camera* testimony based both upon my personal knowledge and information which is available to me in my official capacity. The contents of this affidavit are highly sensitive and have been properly classified in accordance with Executive Order 12356.

3. Borge was, and remains, one of the highest ranking, most radical and influential members of the Sandinista regime. His aggressively Marxist orientation, his activities as Interior Minister of Nicaragua and his private and public pronouncements set him squarely at odds with many important United States foreign policy goals and objectives in Central America. Moreover, as a high level official of the Revolutionary Government of Nicaragua, Borge's actions and statements are accorded great weight by other countries in the region. Conversely, any actions which the United States takes regarding Borge are viewed by other Central American countries as reflecting United States foreign policy orientation.

4. One of the principal bases for my decision to deny Borge's NIV application was that Borge intended to travel to the United States *in his official capacity* as a high rank-

ing member of a foreign government which advances many foreign policy goals that are directly opposed to those of the United States. In this connection, it bears particular emphasis that Borge's visa application was transmitted to the Embassy in Nicaragua by the Nicaraguan Ministry of Foreign Affairs under cover of a diplomatic note and that the accompanying passport was "diplomatic". In my experience, visits to the United States by high level foreign government officials (as opposed to private persons) inevitably have foreign policy consequences. If Borge were to apply for a visa in the future for official government business, the visa might be issued, depending on the international political climate at the time of such application and the purpose of the visit.

5. The international political context is of overriding significance with respect to any decision I make concerning the denial of a visa on foreign policy grounds. In the case of Borge, for example, I determined that his entry into the United States, given the timing of the proposed visit and the stated purpose thereof, would have sent a very wrong message to our allies and adversaries alike concerning United States policies in Central America, and could have had a severely adverse impact on ongoing multilateral efforts by the United States to resolve the current conflict in that region through the "Contadora Group" (i.e., Mexico, Venezuela, Colombia, Panama, Costa Rica, Nicaragua, Honduras, El Salvador and Guatemala).

6. My conclusion that Borge's visit at that time could have had a strong adverse effect on the Contadora Group negotiations was, in turn, buttressed by the adverse foreign policy consequences that resulted from the October, 1983 visit of Nicaraguan Foreign Minister Miguel D'Escoto to this country. D'Escoto took political advantage of his visit to undercut the Contadora multilateral negotiations by publicly advancing a series of proposed

bilateral agreements. D'Escoto's bilateral proposals, and the publicity afforded them by virtue of his presence in the United States, raised concern among United States friends in Central America that the United States was considering, to their possible detriment, direct bilateral negotiations with Nicaragua—concerns which the United States was at great pains to dispel over the ensuing weeks and months through vigorous diplomatic efforts.

7. Therefore, I determined that travel to the United States at that time by Nicaraguan Interior Minister Borge would have been highly prejudicial to the foreign policy interests of the United States, principally because of the repeated efforts by the Revolutionary Government of Nicaragua and its officials to subvert and undermine the regional negotiation process, which was theretofore successful (from the perspective of United States foreign policy), albeit fragile. In my considered judgment, Borge's visit at that time would have seriously damaged prospects for the successful continuation of that delicate diplomatic process.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 1984.

/s/ LAWRENCE S. EAGLEBURGER
Lawrence S. Eagleburger

APPENDIX H

AFFIDAVIT OF LAWRENCE S. EAGLEBURGER

I, LAWRENCE S. EAGLEBURGER, depose and say as follows:

1. I presently serve as the Under Secretary of State for Political Affairs. I have previously provided testimony in the above-captioned matter concerning the October 8, 1983 denial of applications of Ms. Olga Finlay and Ms. Leonor Lezcano (hereinafter, "Finlay" and "Lezcano", respectively) for nonimmigrant visas (hereinafter, "NIV"), and offer the following in supplementation thereof.

2. I am familiar with the facts and circumstances pertinent to the denial of the NIVs in question, and provide this additional *in camera* testimony based both upon my personal knowledge and information which is available to me in my official capacity. The contents of this affidavit are highly sensitive and have been properly classified in accordance with Executive Order 12356.

3. Both Finlay and Lezcano are officials of the Federacion de Mujeres Cubanas (Federation of Cuban Women; hereinafter, the "FMC"), a "mass organization" charged by the Communist Party of Cuba with increasing the social, political and economic activism of Cuban women. The FMC is headed by Ms. Vilma Espin, Alternate Member of the Politburo of the Cuban Communist Party Central Committee. The principal function of the FMC—like that of other organizations subsumed under the Central Committee—is to promote and advance the policy goals and objectives of the Communist Party of Cuba.

4. Significantly, the Cuban General Directorate of Intelligence (hereinafter, "DGI") has a special section on intellectual and academic affairs which routinely employes people like Finlay and Lezcano to influence and exploit

various groups in the United States (e.g., university groups, women's organizations, Cuban-American associations and research institutes) by encouraging them to accept a positive image of the Cuban Revolution and Cuban society.

5. It bears particular emphasis that Finlay and Lezcano intended to travel to the United States not as private Cuban citizens, but rather as official representatives of the Cuban Government, as evidenced by the fact that their visa applications were submitted by the Cuban Ministry of External Affairs and were accompanied by "diplomatic" passports. In my experience, visits to the United States by such foreign government representatives invariably raise foreign policy considerations. Under certain circumstances (described below) visas would be issued to the two women, and a visa was in fact issued to Finlay as recently as December, 1983.

6. The decision to deny visas to Finlay and Lezcano on foreign policy grounds cannot be fully understood absent some familiarity with United States policy regarding Cuba. The United States has had a long-standing policy to prevent Cuba, to the extent possible, from influencing other countries in Central and South America to adopt policies adverse to the interests of the United States. In furtherance of this policy, the United States has for many years and under a variety of administrations sought to deny for Cuba the aura of legitimacy which normal diplomatic relations with the United States would undoubtedly confer. Moreover, the United States applies a very restrictive travel policy toward Cuba and actively enforces a trade embargo against that country under the Trading With the Enemy Act. One particularly relevant aspect of United States policy toward Cuba has been to deny the entry of officials of the Cuban Communist Party or Government into the United States except for the purposes of (i) conducting bilateral discussions with United

States government officials or (ii) participating in meetings of international organizations. (For example, about the time the instant actions were filed, a visa was issued to Finlay for the limited purpose of participating in a Pan-American Health Organization function in Washington, D.C.)

7. In my capacity as Under Secretary of State for Political Affairs, I have personally determined that the denial of entry into the United States of officials of the Cuban Communist Party or Government, other than for the limited purposes described in paragraph 6, *supra*, is an important adjunct of United States foreign policy. I was apprised of the decision of then Assistant Secretary of State Diego Asencio to deny the October 1983 visa applications of Finlay and Lezcano and I ratified that decision as having been consonant with long-standing United States foreign policy toward Cuba. Finally, at the time I ratified Ambassador Asencio's decision to deny the visas to the two Cuban women I was satisfied that they were both Cuban Communist Party officials. In ratifying Ambassador Asencio's decision, I expressly concluded that issuance of the requested visas for the time and purpose stated in the applications would have been prejudicial to the foreign policy interests of the United States.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 1984.

/s/ LAWRENCE S. EAGLEBURGER
Lawrence S. Eagleburger

APPENDIX I

AFFIDAVIT OF LAWRENCE S. EAGLEBURGER

I, LAWRENCE S. EAGLEBURGER, depose and say as follows:

1. I presently serve as the Under Secretary of State for Political Affairs. I have previously provided unclassified testimony in the above-captioned matter concerning the October 18, 1983 denial of an application by former Italian Senator Nino Pasti (hereinafter, "Pasti") for a nonimmigrant visa (hereinafter, "NIV"), and offer the following in supplementation thereof.

2. I am familiar with the facts and circumstances pertinent to the denial of the NIV in question, and provide this additional *in camera* testimony based both upon my personal knowledge and information which is available to me in my official capacity. The contents of this affidavit are highly sensitive and have been properly classified in accordance with Executive Order 12356.

3. [Classified material deleted.]

4. The WPC is a worldwide organization that presents itself as an independent advocate of nuclear disarmament, anticolonialism and national liberation movements. In fact, however, the WPC is both controlled and financed by the USSR.

5. More important for purposes of this action, however, is that the USSR seeks through the WPC, covertly, to influence, organize, manipulate and direct public opinion in the United States and other countries toward Soviet policies of unilateral Western disarmament, and to deflect attention from the military policy and actions of the Soviet Union.

6. The efforts of Soviet-front groups, including the WPC, to manipulate Western anti-nuclear movements have become increasingly apparent and aggressive over

the past several years. (To some extent, these efforts have been reported in the media.) Genuinely independent peace movements in a number of foreign countries have come under increasing strong pressure from Soviet-front groups and their affiliates to adopt a harsh, anti-U.S. policy line. These outside Soviet pressures have split the peace movement in some West European countries and have led to the expulsion of at least one Soviet diplomat from Denmark. In my considered judgment the Soviet Union, through its surrogates, including the WPC, seeks to manipulate certain anti-nuclear groups and activities as a means of advancing the Soviet goal of *unilateral* Western arms reduction or disarmament.

7. The Administration, at the highest levels, has determined that such covert manipulations and attempted subversion of legitimate peace and disarmament movements for the purpose of supporting the doctrine, propaganda and disinformation aims of the Soviet Union, an undisclosed foreign government principal, is directly contrary to the U.S. national interest, particularly in view of recent or ongoing discussions, negotiations and proposals related to potential disarmament or arms limitations and and reductions.

8. Accordingly, the Administration determined in 1982 that persons who are members of, or affiliated with, the WPC and who seek to enter the United States to further Soviet policy objectives, should be denied entry to the United States, except in limited circumstances not relevant here. A careful evaluation of Pasti's September 28, 1983 visa application, in light of the available intelligence information and the stated purpose of his proposed trip, led me to ratify the conclusion of the Assistant Secretary for Consular Affairs that his entry into the United States at that time would have been prejudicial to the foreign policy interests of the United States and that his visa should be denied.

9. In this connection, I wish to emphasize that the timing of Pasti's proposed visit coincided with the initial deployment of Cruise and Pershing II missiles in certain NATO countries—a particularly delicate period for United States foreign policy, and a period during which the Soviet Union was employing every propaganda tool at its disposal in an effort to frustrate the deployment. Based on all the information available, I have reason to believe that Pasti intended to use his visit to the United States, [classified material deleted] as a retired NATO general, to foster Soviet objectives that are inimical to the foreign policy interests of the United States.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 1984.

/s/ LAWRENCE S. EAGLEBURGER
Lawrence S. Eagleburger

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No. 86-656 (2)

Supreme Court, U.S.
FILED
NOV 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, *et al.*, *Petitioners*,

—v.—

JAMES ABOUREZK, *et al.*, *Respondents*.

GEORGE P. SHULTZ, *et al.*, *Petitioners*,

—v.—

CITY OF NEW YORK, *et al.*, *Respondents*.

GEORGE P. SHULTZ, *et al.*, *Petitioners*,

—v.—

BRUCE CRONIN, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents submit this brief in opposition to the petition for certiorari filed by the Solicitor General, which seeks review of the judgment entered in this action by the United States Court of Appeals for the District of Columbia on March 11, 1986.

STATEMENT OF THE CASE

These three consolidated cases were filed in December 1983, alleging that on four separate occasions the government improperly denied nonimmigrant visas to foreign speakers under §212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(27). Respondents contend that these visa denials are inconsistent with the plain language of the statute, which applies only when there is reason to believe that a foreign visitor will engage in "activities ... prejudicial to the public interest" if admitted to the United States. Alternatively, respondents contend

that the statute is unconstitutional if construed to permit visa denials based on a speaker's political views or the anticipated reaction of the speaker's American audience.[1]

Neither issue has yet been resolved. The Court of Appeals expressly reserved decision on respondents' constitutional claim. (App. at 30a, n.24).[2] Respondents' statutory claim, which had been rejected by the district court, was remanded by the Circuit "for the fuller proceedings appropriate prior to resolution of this question ..." (App. at

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1. The numerous respondents in this action are all American citizens or American-based organizations. Their standing to challenge a visa denial under these circumstances was settled by Kleindienst v. Mandel, 408 U.S. 753 (1972). As this Court noted in Mandel: "It is now well established that the Constitution protects the right to receive information and ideas." Id. at 762 (citations omitted).

2. Unless otherwise noted, all references are to the appendix to the petition for certiorari.

22a). In short, the legal issues presented by this case are still evolving. Precisely because those issues are important, they should not be resolved on the incomplete record that currently exists.

The opinion below fairly recites the relevant facts and procedural history. (App. at 5a-6a). Certain items, however, are worthy of emphasis. First, the government has never alleged a basis for believing that any of the excluded foreigners intends or is likely to engage in prejudicial "activities" if permitted to accept the speaking invitations proffered by respondents in the United States. Instead, petitioners have argued that §212(a)(27) authorizes a visa denial whenever there is reason to believe that a foreigner's "entry" or "presence" in the United States would, in the government's view, be prejudicial to the public interest.

Second, petitioners' own affidavits

strongly suggest that these visa denials were motivated by a desire to censor political speech. Accordingly, petitioners' emphasis on "entry" and "presence" as operative terms under §212(a)(27) is of questionable relevance to these proceedings and hardly a basis for certiorari on the present record.

The government initially attempted to justify its visa denials in this case by submitting a conclusory affidavit from the State Department that merely repeated the statutory language of §212(a)(27). When that explanation was deemed inadequate by the district court (App. at 76a), the government submitted classified affidavits for the court's ex parte review. (App. at 86a-94a). Those affidavits have since been declassified. Their contents help to illuminate the actual issues raised by this case.

For example, in Cronin v. Shultz, the

affidavit of Lawrence S. Eagleburger, then Under Secretary of State for Political Affairs, reveals that in 1982 a decision was made to bar all members of the World Peace Council (WPC) from the United States because of a generalized concern that the WPC was being used by the Soviet Union to further its "propaganda" and "disinformation" campaign in favor of unilateral western disarmament. (App. at 92a-94a). Pursuant to this policy, Nino Pasti, a former Italian NATO general, was prohibited from addressing a disarmament rally in Boston. Whatever the merits of that decision, it clearly reflects a preoccupation with Pasti's proposed speech in this country, rather that his mere "entry" or "presence."

Similarly, Mr. Eagleburger's affidavit in Abourezk v. Reagan seems less concerned with abstract issues of "entry" or "presence" than with inhibiting the ability of the American people to hear the political views

of Nicaragua's Interior Minister. Thus, the Eagleburger affidavit explains that Tomas Borge was denied a visa, at least in part, because several months earlier another Nicaraguan official had visited this country and "publicly advanc[ed]" a series of proposals that were allegedly inconsistent with the Administration's foreign policy goals. (App. at 87-88a).

Third, there is every reason to believe that the further inquiry into congressional acquiescence directed by the Court of Appeals will be both feasible and useful. The government argues that, like Haig v. Agee, 453 U.S. 280, 303 (1981), its claim of congressional acquiescence should not be defeated by the paucity of examples in which §212(a)(27) was even arguably invoked based on mere "entry" or "presence." But unlike Haig v. Agee, the government's statistics in this case indicate that §212(a)(27) has been invoked a total of

519 times between 1963 and 1983. Pet. for Cert. at 6 n.2. Surely it is not inappropriate to ask whether the government can offer more than the three examples it has so far provided to support its claim of congressional acquiescence. (App. at 20a). That question, however, cannot be answered without further proceedings in the district court.

Fourth, the government's contention that the decision below inappropriately limits its foreign policy flexibility is diminished by the government's inability to explain why it did not use §212(a)(28). Absent a credible explanation, the Court of Appeals was properly concerned that §212(a)(27) was principally chosen to circumvent the congressional limitations on §212(a)(28)

embodied in the McGovern Amendment.[3] (App. at 22a-24a). Indeed, the consular officer who initially reviewed Nino Pasti's visa application identified it as a §212(a)(28) case. (App. at 5a). Section 212(a)(27) was not invoked until Pasti's visa application was transmitted to Washington.

Fifth, the spectre of unregulated discovery raised by the government if this petition is denied is premature and unwarranted. The government has raised, and can continue to raise, discovery disputes with the district court as circumstances

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3. Under the McGovern Amendment, 22 U.S.C. §2691 (1977), the Secretary of State must certify to both houses of Congress that national security is at stake before he can recommend exclusion from the United States based on membership in a proscribed organization. No such certification was made in this case.

dictate.[4]

Finally, and perhaps most importantly, no injunction has been issued in this case and no final judgment has yet been rendered. The government has not been required by judicial order to admit any excluded foreign speaker, either in this case or any other case of which respondents are aware. Nor has the government been forced to abandon reliance on §212(a)(27). To the contrary, the government has persisted in its interpretation and use of §212(a)(27) throughout the pendency of this litigation.

In its present posture, therefore, this case presents a still unresolved issue of statutory construction on an admittedly controversial and important subject. Plenary consideration by this Court may well be

4. Clearly, this Court is not the proper forum to litigate discovery disputes in the first instance.

appropriate someday. It is not appropriate now, for the reasons described below.

REASONS FOR DENYING THE WRIT

I. THE JUDGMENT BELOW IS CLEARLY NON-FINAL AND CONTEMPLATES FURTHER PROCEEDINGS ON THE PRECISE ISSUE NOW RAISED IN THIS COURT

In his dissent below, Judge Bork describes the judgment of the Court of Appeals in the following terms: "The majority's opinion is a cautious one: major issues presented in this litigation are left for subsequent resolution." (App. at 64a). For precisely that reason, the petition for certiorari should be denied. There will be ample time for this Court to consider the propriety of review once the record is complete and the difficult legal issues raised by this case have been fully considered by the lower courts.

The premature nature of this petition is illustrated by the government's first "question presented." Specifically, the government asks this Court to decide "whether 8 U.S.C. §1182(a)(27) permits denial of a

visa to an alien only if his activities - and not just his presence or entry - would be prejudicial to the public interest." While that is undoubtedly an interesting question, it mischaracterizes the actual holding by the Court of Appeals. The Court of Appeals carefully remanded this matter to the district court to determine whether the government could sustain its claim that Congress had acquiesced in an interpretation of §212(a)(27) that permits visa denials based on mere "entry" or "presence."

The government cannot have it both ways. If additional relevant evidence exists of congressional acquiescence, then this case is not yet ripe for review. If the government wants the case reviewed now, it should be prepared to stipulate that no such evidence of congressional acquiescence exists.

Even under these latter circumstances, however, there are compelling reasons why

respondents should be given the opportunity to continue discovery before certiorari is granted. Thus far, the government has offered three examples of past visa denials under §212(a)(27) that were allegedly based on mere "entry" or "presence." None conclusively establishes the congressional acquiescence that petitioners assert.

One of those examples involves Thomas Liao, a Formosan political leader who was barred from the United States under §212(a)(27) in 1959, 1961 and 1962, apparently because of a perceived "incompatibility between Mr. Liao's projected activities while in the United States and our foreign policy objectives with respect to Taiwan and the Republic of China." (App. at 20a).

Of course, to the extent that Mr. Liao was excluded because of his projected activities, his example does nothing to prove

that Congress has acquiesced in the use of §212(a)(27) to bar foreign speakers merely because their "entry" or "presence" was deemed prejudicial to the public interest. Furthermore, the discovery so far produced by the government indicates that the then chairman of the Senate Foreign Relations Committee, J. William Fulbright, strenuously objected to Mr. Liao's exclusion. It is certainly conceivable that further discovery will reveal additional problems with the examples proffered by the government.[5]

In any event, the important legal issues raised by this case should not be decided

5. As a second example, the government cites Otto Skorzeny, a former, high-ranking, Nazi SS officer who was excluded from the United States in 1959. C.A. App. A306. Former nazis, however, present a sui generis problem under the immigration laws. See 8 U.S.C. §1182(a)(33). The exclusion of Skorzeny, therefore, does not reveal very much about general congressional attitutes toward §212(a)(27).

based solely upon the government's self-interested selections from the historical record. Several months ago, the government provided respondents with a list of 175 documents "withheld from production" pending a declassification review. Many of the documents on that list appear directly relevant to the question of past administrative practice under §212(a)(27). For example, the first 20 documents on the list appear to include at least 7 memoranda discussing the appropriate interpretation of §212(a)(27).[7] These documents should be available to respondents and this Court prior to a final adjudication on the merits.

The government attempts to justify this departure from orderly procedure by arguing that the remand directed by the Court of Appeals will intrude into the government's

7. Five of the first six documents on the list refer to the case of Thomas Liao.

conduct of its foreign affairs. Pet. for Cert. at 25. As the government itself acknowledges, however, the scope of the remand is narrowly limited. Id. The question of whether or not the specific visa denials issued in this case were based on reasons independent of the applicants' membership in §212(a)(28) organizations simply requires a reexamination of the government's now declassified affidavits. The inquiry into congressional acquiescence only asks the government to complete the process that it voluntarily chose to begin; namely, the identification of any other historical examples in which Congress allegedly endorsed the use of §212(a)(27) based on mere "entry" or "presence."

Similarly, an examination into past administrative practice is clearly relevant in light of the government's claim that past administrative practice supports petitioners'

present interpretation of the statute. Again, available documents do not, on their face, seem to support that contention. For example, a 1982 opinion letter by the Office of Intelligence Policy and Review of the Department of Justice concludes that "[t]he law as framed seems to permit findings of ineligibility under [§212(a)(27)] only as to persons whom we have reason to believe intend to engage in proscribed activities" and that "the mere fact that a businessman or scientist might be exposed to controlled technology while in the United States, standing alone, is not enough to trigger section 212(a)(27)."[8]

Finally, the district court is fully capable, should the need arise, of balancing national security requirements against legitimate discovery needs. Indeed, the

8. See C.A. App. A189.

government has already invoked the state secrets privilege with regard to the deleted portions of Mr. Eagleburger's affidavit in Cronin v. Shultz.[8] At this stage of the proceedings, there is no reason to assume that the district court will be insensitive to the government's legitimate national security needs.

This Court has frequently noted that certiorari will not normally be granted to review an interlocutory order. E.g. Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. R. Co., 389 U.S. 327 (1967)("because the Court of Appeals remanded this case, it is not yet ripe for review by this Court"). As Justice Jackson explained in an analogous context:

> While we might be able, on the

8. Once the petition for certiorari was filed, the district court stayed all discovery without ever ruling on the propriety of the privilege in this instance.

> present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

Kennedy v. Silas Mason Co., 334 U.S. 249, 257 (1948). Cf. Los Angeles v. Preferred Communications, ___ U.S. ___, 90 L.Ed.2d 480, 488 (1986).

That sound rule of judicial administration should be followed here.

II. THE DECISION BELOW IS CORRECT

Because petitioners challenged so many aspects of the complaint below, it is worth emphasizing the limited nature of their present appeal. Petitioners in this Court do not challenge jurisdiction or standing, they do not claim that the case is moot, nor do they rely on the political question doctrine

to defeat judicial review.

Rather, petitioners contend that the court below erred in holding that the reference to prejudicial "activities" in §212(a)(27) requires some reference to actual activities in the United States before it can be invoked. Additionally, the government argues that membership in a proscribed organization is a ground for exclusion under both §212(a)(27) and §212(a)(28) and that the government is therefore free, in its unlimited discretion, to ignore the strictures of the McGovern Amendment simply by relying on the former subsection rather than the latter. In the absence of any persuasive evidence of congressional acquiescence in the government's strained interpretation of the statutory language, both arguments were properly rejected by the court below.

The government attempts to buttress its

statutory claims by stressing that this case involves foreign policy and immigration, two areas in which the courts have traditionally deferred to the political branches. Whatever validity that tradition may have in other contexts, it does not apply here where the question is whether the executive has followed the express will of Congress. When the executive oversteps its congressional authorization, even in areas of national security, this Court has never hesitated to correct the balance. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Cf. Japan Whaling Association v. American Cetacean Society, 54 U.S.L.W. 4929, 4931

(June 24, 1986).[9]

The Court of Appeals applied the traditional tools of statutory construction to the record before it, see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), in determining that the executive in this case exceeded the bounds of congressional intent. That conclusion is fully consistent with this Court's relevant precedents.

A. Plain Language of the Statute

This Court has often emphasized that "[t]he starting point for interpreting a statute is the language of the statute

9. In a further effort to flavor this case with foreign policy implications, the government has consistently referred to the problems created for the United States by the mere "presence" in this country of the Shah of Iran. The Shah's "presence" in this country, however, could have been avoided by a presidential proclamation under §212(f), 8 U.S.C. §1182(f), without distorting the meaning and reach of §212(a)(27). (App. at 7a, n.2).

itself." Consumer Product Safety Comm. v. GTE Sylvania, 447 U.S. 102, 108 (1984). Here, of course, the language of §212(a)(27) refers to prejudicial "activities." Yet, the government has never even alleged that any of the excluded foreigners in this case is likely to engage in prejudicial "activities" if admitted to the United States.

Instead, the government argues that the phrase prejudicial "activities" embraces mere "presence" or "entry." The difficulty with this argument is that the exclusionary categories created by Congress in §212(a) clearly distinguish between exclusions based on status and exclusions based on conduct. Section 212(a)(27) fits into the latter category. As the court below noted: "Congress' undoubted ability to draft categories based only on status, when that is the legislature's intention, strengthens the inference that the words 'to engage in

activities' contained in subsection (27) were not put there inadvertently." (App. at 16a-17a).

This is especially true when §212(a)(27) is compared to §212(a)(28). Section 212(a)(28), unlike §212(a)(27), specifically refers to a visa applicant's status as a member of a communist-affiliated organization. Recognizing this distinction, Congress carefully limited the reach of §212(a)(28) by adopting the McGovern Amendment, which does not apply to §212(a)(27). Petitioners' expansive construction of §212(a)(27) inappropriately upsets this delicately balanced congressional scheme.

B. Legislative History

Section 212(a)(27) was taken almost verbatim from §22(1) of the Internal Security Act of 1950.[10] Upon introducing §22(1) of

10. 64 Stat. 987.

the Act, Senator McCarran explained: "What the bill will do ... is to permit the deportation of a Communist who comes here under diplomatic ... status and then uses that status as a screen behind which to carry on subversive activity." 96 Cong. Rec. 14174 (1950).[11] Nothing in the legislative history of §212(a)(27) suggests that Congress intended to broaden the definition of prejudicial "activities" in §212(a)(27) beyond the description offered by Senator McCarran only two years earlier. At best, the legislative history is "inconclusive," as the court below described. (App. at 18a).

The government makes much of the claim that Congress has allegedly acquiesced in the

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11. The 1950 Conference Committee Report also refers to exclusions based upon prejudicial "activities" in the United States, H.R. Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950), as does the report of the Senate Judiciary Committee, S.Rep. No. 1515, 81st Cong., 2d Sess. 800 (1950).

executive's application of §212(a)(27) based on mere "presence" or "entry." In support of that claim, however, the government offers only three ambiguous examples, the most recent of which is more than twenty years old. These "scattered rulings ... not consistently of one pattern," Kent v. Dulles, 357 U.S. 116, 128 (1958), do not justify the government's plea to override the plain statutory language. The government was fortunate to be given a second opportunity to produce further evidence. It is hardly in a position to complain about that ruling to this Court.

C. The McGovern Amendment

This Court has frequently observed that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Red Lion Broadcasting v. FCC, 395 U.S. 367, 380-81 (1969). Furthermore, this Court has

held that "all parts of a statute, if at all possible, are to be given effect." Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 633 (1973).

Petitioners pay lip service to this principle. However, at the same time, they endorse a version of §212(a)(27) that effectively negates the McGovern Amendment. As the court below perceived, if it were true that mere membership in a proscribed organization justified exclusion under §212(a)(27), then petitioners could always avoid the certification requirement of the McGovern Amendment simply by using §212(a)(27) instead of §212(a)(28). Without conclusive evidence supporting the government's view, it would be extraordinary to conclude that Congress intentionally engaged in such a meaningless exercise when it adopted the McGovern Amendment to achieve "greater United States compliance" with the Helsinki Accords. 22

U.S.C. §2691(a).

D. Administrative Construction

The government contends that past administrative practice has consistently supported its interpretation of §212(a)(27) and should be given due deference by the courts. The record suggests otherwise.

Most notably, petitioners fail even to mention two relevant opinions by the Board of Immigration Appeals. In Matter of McDonald and Brewster, 15 I. & N. 203 (BIA 1975), the Board observed that §212(a)(27) was "designed to exclude aliens who seek to enter solely, principally, or incidentally to engage in activities inimical to the internal security of the United States ... " Id. at 205 (emphasis added). Similarly, in Matter of Zamora, A105-50-431 (March 11, 1958), an unreported decision, the Board refused to exclude an alien pacifist under §212(a)(27) despite the alien's alleged disagreement with

United States foreign policy objectives.

In addition, the government neglects to mention the 1982 Justice Department memorandum which concludes that §212(a)(27) only applies to "person[s] whom we have reason to believe intend to engage in proscribed activities."[13] The government also ignores an affidavit in the record by Leonard Meeker.[14] Mr. Meeker states that during his 23 years with the State Department, including service as the Legal Adviser from 1965-1969, §212(a)(27) "was understood . . . to be the basis for denying visas to aliens whose anticipated activities in the United States would create dangers to this country of a gravity comparable to espionage or sabotage."[15]

13. See note 8, supra.

14. C.A. App. A250.

15. Id. at A251-52.

In short, the plain language of §212(a)(27) and the clear purpose of the McGovern Amendment strongly support the ruling below. The legislative history and evidence of past administrative practice "tug[] in more than one direction." (App. at 17a). Under these circumstances, the Court of Appeals was surely entitled to remand for further proceedings on the pivotal question of legislative intent. Given the absence of any final decree, that interlocutory order should not be disturbed.

CONCLUSION

For the reasons stated herein, the petition for certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, ET AL., PETITIONERS

v.

JAMES ABOUREZK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

BRUCE CRONIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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CERTIORARI GRANTED DECEMBER 15, 1986

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* The opinions of the district court and the court of appeals are printed in the appendix to the petition for a writ of certiorari and have not been produced here.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-563

JAMES ABOUREZK, ET AL.

v.

RONALD WILSON REAGAN,
PRESIDENT OF THE UNITED STATES, ET AL.,

(G)09-26-85 4-Appellees' report to the Court (m-26) [#8]

(T)10-02-85 Notice from Clerk, District Court re: classified documents

(E)10-22-85 4-Oral argument transcript (1 volume) [#8]

(T)10-30-85 4-Letter from counsel for appellees advising of additional authorities pursuant to FRAP 28(j) (m-30) [8]

(E)11-06-85 4-Letter from counsel for appellants advising of additional authorities pursuant to FRAP 28(j) (m-4) [#8]

(E)11-19-85 4-Letter from counsel for appellees in response to letter from counsel for appellants of 11/4/85. (m-19) [#8]

(T)01-13-86 4-Letter from counsel for appellants advising of additional authorities pursuant to FRAP 28(j) (m-8) [8]

(D)03-11-86 Opinion for the Court filed by Circuit Judge Ginsburg.

(D)03-11-86 Dissenting opinion filed by Circuit Judge Bork.

(D)03-11-86 Judgment by this Court that the judgment of the District Court appealed from in these causes is hereby vacated and these

cases are remanded, in accordance with the Opinion for the Court filed herein this date.

(D)03-11-86 Mandate order.

(J)03-24-86 4-Appellants' bill of costs (m-20) (9)

(T)04-25-86 30-Appellees' petition for rehearing and suggestion for rehearing en banc (m-25) [1]

(E)05-23-86 Per curiam order denying appellees' petition for rehearing. Edwards, Ginsburg and Bork (who would grant the petition for rehearing), CJs.

(E)05-23-86 Per curiam order, en banc, that appellees' suggestion for rehearing is denied. CJ Robinson, Wright, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia, Starr, Silberman and Buckley, CJs. (Bork, Scalia, Starr, Silberman and Buckley, CJs would grant the suggestion for rehearing *en banc*. Wright and Mikva, CJs, did not participate in this order.)

(D)06-02-86 Costs are awarded to James Abourezk, et al in the amount of $252.78 and taxed against Ronald Wilson Reagan, George P. Shultz, William French Smith, Alan C. Nelson.

(T)06-04-86 4-Appellees' motion to stay the mandate (m-4) [1]

(E)06-24-86 Per curiam order granting appellees' motion to stay the mandate. Absent notice to the Court that the Solicitor General has determined to file a petition for *certiorari*, the mandate will issue on July 8, 1986. Edwards, Ginsburg and Bork, CJs)

(C)07-08-86	4-Appellees' motion for a seven day stay of the mandate (m-8) (1)
(C)07-09-86	Per Curiam order denying appellees' motion for a seven day stay of mandate. (Edwards, Ginsburg and Bork, CJs)
(C)07-09-86	MANDATE ISSUED.
(E)08-15-86	Notice from Clerk, Supreme Court that an extension of time was granted to file a petition for a writ of certiorari to and including September 20, 1986 in No. A-99 [1]
(E)09-19-86	Notice from Clerk, Supreme Court that an extension of time was granted to file a petition for writ of certiorari to and including October 20, 1986 in No. A-99 [1]
(R)12-17-86	Letter from Clerk, Supreme Court advising that petition for writ of certiorari was granted in SC #86-656 on 12-15-86 [1]
	RECEIPT FROM DISTRICT COURT FOR RECORD 7-24-86
(C)09-28-84	Copy of notice of appeal and docket entries from Clerk, DC (n-2)
(C)09-28-84	Docketing fee paid in the District Court on 09-21-84
(C)09-28-84	Docketing statement mailed to counsel for appellants
(J)10-18-84	4-Appellants' docketing statement (m-18)
(V)10-23-84	Clerk's order, sua sponte, that the above captioned cases 84-5673, 84-5681 and 84-5708 are hereby consolidated
(V)10-23-84	Clerk's order that a briefing schedule is set as follows: Appellant(s) brief and appendix – 01/04/85; Appellee(s) brief – 02/04/85; Appellant(s) reply brief – 02/18/85. The Clerk shall include this

case in the pool of cases available for selection on this Court's March/April, 1985 calendar.

(J)10-24-84 4-Appellants' motion to consolidated appeals—see 10-23-84 order (m-23)

(J)01-04-85 2-Letters from parties consenting to the filing of the amicus curiae brief of Association of the Bar of the City of New York

(J)01-04-85 2-Letters from parties consenting to the filing of the amicus curiae brief of American Association of University Professors, et al.

(J)01-04-85 15-Brief of Association of the Bar of the City of New York as amicus curiae (m-3)

(J)01-04-85 15-Brief of American Association of University Professors, et al. as amicus curiae (m-4)

(J)01-07-85 15-Appellants' brief (m-4) (BIN 29-2)

(J)01-07-85 7-Joint appendix (m-4)

(J)01-29-85 4-Appellees' (federal) motion for leave to file motion to extend time to file brief (m-29) [6]

(F)02-05-85 Clerk's order that appellees' motion to extend time is granted; and the briefing schedule is revised as follows: Appellee(s) brief—02/27/85; Appellant(s) reply brief—03/13/85. This disposition will affect the calendaring of the instant case(s) and the Clerk shall include this case in the pool of cases available for selection on the Court's April/May calendar. (Leave to file the instant motion is hereby granted)

(F)02-05-85 4-Appellees' motion for enlargement of time to file brief (m-29)—per above order

(R)02-28-85	15-Appellees' brief (m-27)
(C)03-06-85	15-Appellees' corrected brief (m-6)
(R)03-19-85	15-Appellants' reply brief (m-13)
(G)04-10-85	15-Appellants' supplemental brief (m-8)
(G)08-21-85	Certified Original Record (2) volumes and (1) volume of transcript under separate cover BIN [B-5]
(E)09-04-85	Clerk's order, sua sponte, that the following times are allotted for oral argument: Appellants – 25 minutes and Appellees – 25 minutes.
(E)09-05-85	Per curiam order that in accordance with the representation made in Brief for the Appellees at 41 n.32, the court instructs Appellees to make available to the court, forthwith, the three classified affidavits, submitted to the district court *in camera.*
(T)09-09-85	4-Letter from counsel for appellees transmitting, for in camera inspection, the documents referred to in this Court's 9/5/85 order (m-9) [25]
(T)09-12-85	Notice from Clerk, District Court that a motion was filed to return classified documents to custody of government counsel
(E)09-23-85	Argued before Edwards, Ginsburg and Bork, CJS. [INACTIVE BIN NO. 62-3] The Court granted counsel leave to file supplemental memorandum.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 83-573

ABOUREZK, ET AL.

v.

REAGAN, ET AL., No. 83-373

1983		
Dec 15	1	COMPLAINT; appearance.
Dec 15		SUMMONS (5) issued.
1984		
Jan 3	2	INTERROGATORIES (first set) by pltffs. to deft. George P. Shultz (ml)
Jan 3	3	INTERROGATORIES (first set) by pltffs. to deft. William French Smith. (ml)
Jan 19	4	AFFIDAVIT OF SERVICE upon the U.S. Attorney on 12-15-83. (ml)
Jan 19	5	AFFIDAVIT OF SERVICE upon deft. William French Smith by certified mail on 12-19-83; upon deft. George P. Shultz by certified mail on 12-17-83; upon deft. Alan C. Nelson by certified mail on 12-20-83 and upon deft. Ronald Wilson Reagan by certified mail on 12-19-83; attachments (4). (ml)
Jan 30	6	MOTION by defts. for extension of time in which to respond to the complaint and for a protective order staying discovery; memorandum of P&A's. (ml)
Feb 9	7	MEMORANDUM & ORDER filed 2-8-84 directing deft. to file their answer to pltfs' complaint or a dispositive mo-

		tion on or before 3-1-84; staying discovery pending the Court's consideration of such dispositive motion. (N) GREENE, J. (ml)
Mar 1	8	MOTION by defts. for leave to file a consolidated motion on the merits, and to exceed the page limit specified in the Local Rules; Exhibit (Motion to Dismiss) (ml)
a.	9	PROFFER & MOTION by defts. for leave to submit classified affidavits for the Court's in camera inspection; memorandum in support. (ml)
Mar 9	10	MOTION by pltffs. and memorandum in support for extension of time in which to respond to defts' motion (1) for dismissal or summary judgment and (2) for leave to submit classified affidavits in camera. (ml)
Mar. 15	11	ORDER filed 3-14-84 granting pltfs' motion for extension of time until 4-16-84 to respond to defts' consolidated alternative motions for dismissal or summary judgment, and motion for leave to submit classified affidavits in camera. (N) GREENE, J. (ml)
Apr 6	12	MOTION by pltffs. for leave to file a consolidated response to defts' alternative consolidated motions for dismissal or summary judgment and to exceed the page limit specified in the Local Rules. (ml)
Apr 11	13	ORDER filed 4-10-84 granting pltfs' motion for leave to file a consolidated response to defts' alternative motion for dismissal or summary judgement. (N) GREENE, J. (ml)

Apr 16	14	MOTION by pltffs. and memorandum in support thereof for three day extension of time in which to respond to defts' motions (1) for dismissal or summary judgment and (2) for leave to submit classified affidavits in camera. (ml)
Apr 19	15	ORDER filed 4-18-84 granting pltffs' motion for an extension of time until 4-19-84 to file response to defts' consolidated motions for dismissal or summary judgment, and motion for leave to submit classified affidavits in camera. (N) GREENE, J. (ml)
Apr 19	16	MEMORANDUM by pltfs'. in opposition to defts'. motion for leave to submit classified affidavits for the Court's in camera inspection. (dc)
Apr 19	17	OPPOSITION by pltfs'. to defts'. motion to dismiss or, in the alternative, for summary judgment; memorandum of P&A's in opposition to defts'. motion to dismiss or, in the alternative, for summary judgment; appendix A&B; statement of genuine issues; affidavits and declarations (28) in opposition to defts'. motion to dismiss or, in the alternative, for summary judgment. (dc)
Apr 26	18	MOTION by defts. and memorandum in support thereof for an extension of time in which to reply to pltffs' opposition to the government's dispositive motion. (ml)
May 1	19	ORDER filed 4-30-84 granting defts' motion for an extension of time until 5-7-84 to file reply to pltffs' opposition to motion to dismiss. (N) GREENE, J. (ml)

May 2	20	NOTICE by pltffs. of filing executed declarations; declaration of Chai R. Feldblum; declaration of Jill Gay; declaration of Martin Hamilton; declaration of Anthony Palomba; declaration of Olga Finlay; declaration of Nino Pasti with attachment; declaration of Richard Parker. (ml)
May 2	21	MOTION by pltffs. and memorandum in support thereof to amend complaint by adding two new pltffs; Exhibit (First Amended Complaint). (ml)
May 7	22	MOTION by defts. for leave to file a reply memorandum exceeding the page limit specified in the local rules; Exhibit (Reply). (ml)
May 8	23	RESPONSE by defts. to motion to add new parties-pltf. (ml)
May 9	24	ERRATA by defts. to their reply to pltffs' opposition to defts' motion to dismiss or, alternatively, for summary judgment. (ml)
May 11	25	ORDER filed 5-9-84 granting defts' motion for leave to file a reply memorandum exceeding the twenty-five page limit. (N) GREENE, J. (ml)
May 11	26	REPLY by defts. to pltffs' opposition to defts' motion to dismiss or, alternatively, for summary judgment; tale of contents; second affidavit of Louis P. Goelz; reply to statement of genuine issues. (ml)
May 14	27	ORDER filed 5-11-84 granting pltffs' motion for leave to amend their complaint by the addition of Exhibit A. (N) GREENE, J. (ml)

May 14	28	FIRST AMENDED COMPLAINT by pltffs. for injunctive and declaratory relief. (ml)
Jul 2		MOTION of defts. to dismiss and motion to submit classified affidavits argued and taken under advisement. (Rep. N. Sokal) GREENE, J. (ml)
Jul 9	29	MEMORANDUM ORDER filed 7-5-84 granting defts' motion for leave to submit *in camera* three classified affidavits of Secretary Lawrence Eagleburger. (N) GREENE, J. (ml)
Jul 10	30	LETTER dated 7-5-84 to Judge Greene from Charles S. Sims, counsel for pltffs. "Let this be filed." (fiat) GREENE, J. (ml)
Jul 12	31	NOTICE by defts of in Camera Submission of Classified Affidavits. (nb)
Jul 19	32	ORDER filed 7-17-84 directing that Mr. Eagleburger's Classified Affidavits be placed under Seal. (N) GREENE, J. (sb)
Jul 24	33	TRANSCRIPT OF PROCEEDINGS from 7-2-84; Pages 1-62; (Rep: Nicholas Sokal). (nb)
Jul 31	34	OPINION filed 7-27-84. (N) GREENE, J. (ml)
Jul 31	35	ORDER filed 7-27-84 granting defts' motion for summary judgment; dismissing action. (N) GREENE, J. (ml)
Sep 21	36	NOTICE of appeal by pltffs. from order entered 7/27/84; $5.00 filing fee and $65.00 docketing fee paid and credited to U.S. Copy of notice mailed to Thomas W. Hussey. (ew)
Sep 26		PRELIMINARY RECORD transmitted to USCA; USCA *84-5673*

CITY OF NEW YORK, ET AL.

v.

SHULTZ, ET AL., No. 83-374

1983			
Dec 15	1	COMPLAINT; appearance.	mf
Dec 15		SUMMONS (4) issued.	
1984			
Jan 3	2	FIRST set of interrogatories by pltffs. and document requests to deft William French Smith.	(ew)
Jan 3	3	FIRST set of interrogatories by pltffs. and document requests to deft. George P. Shultz.	
Jan 19	4	DECLARATION OF service of process of Kathryn Carovano of service of summons and complaint upon U.S. Attorney on 12/21/83.	(ew)
Jan 19	5	DECLARATION of service of process of Sarah K. Householder of service of summons and complaint upon Secretary George P. Shultz, Dept. of State on 12/17/83; William French Smith, Attorney General on 12/19/83 & Alan Nelson, Director INS on 12/20/83; Attachments (3).	(ew)
Jan 30	6	MOTION of defts. for extension of time in which to respond to the complaint and for a protective order staying discovery; memorandum.	(ew)
Feb 15	7	MEMORANDUM AND ORDER filed 2-8-84 directing defts to file their answer to pltfs complaints or a dispos-	

		itive motion on or before 3-1-84; staying discovery pending the Court's consideration of such dispositive motion. (N) (orig. filed in CA 83-3739) GREENE, J. (dj)
Mar 1	8	MOTION of defts for leave to file a consolidated motion on the Merits and to exceed the page limit specified in the Local Rules; Exhibit (Motion to dismiss or, in the alternative, for summary judgment. (Original filed in CA 83-3739) (dj)
Mar 1	9	PROFFER AND MOTION of defts for leave to submit classified affidavits for the Court's in camera inspection; memorandum. (Original filed in CA 83-3739) (dj)
Mar 9	10	MOTION and memorandum by pltffs. in support thereof for extension of time in which to respond to defts motions (1) for dismissal or summary judgment and (2) for leave to submit classified affidavits in camera. (ew)
Mar 19	11	ORDER filed 3/14/84 granting pltffs motion for extension of time until 4/15/84 to respond to defts consolidated alternative motions for dismissal or summary judgment, and motion for leave to submit classified affidavits in Camera. (N) GREENE, J. (ew)
Apr 6	12	MOTION of pltffs. for leave to file a consolidated response to defts alternative consolidated motions for dismissal or summary judgment and to exceed the page limit specified in the Local Rules. (Orig. filed in 83-3739) (ew)
Apr 10	13	ORDER granting pltffs motion for leave to file a consolidated response to defts

alternative motions for dismissal or summary judgment.
(N) GREENE, J. (ew)

Apr 16 14 MOTION of pltffs. and memorandum in support thereof for three day extension of time in which to respond to defts motions (1) for dismissal or summary judgment & (2) for leave to submit classified affidavits in camera.

Apr 18 15 ORDER granting pltfs motion for an extension of time until April 19, 1984 to file response to defts consolidated motions for dismissal or summary judgment and motion for leave to submit classified affidavits in camera.
(N) GREENE, J. (ew)

April 19 MEMORANDUM by pltf. in opposition to defts. motion for leave to submit classified affidavits for the court's in camera inspection. (Filed in 83-3739)
(ew)

April 19 OPPOSITION by pltfs. to defts. motion to dismiss or, in the alternative, for summary judgment; memorandum of points and authorities; appendix; statement of genuine issues; affidavits & declarations in support.
(Filed in 83-3739) (ew)

April 26 16 MOTION of defts. and memorandum in support thereof for an extension of time in which to reply to pltf. opposition to the Government's dispositive motion. (Orig. filed in 83-3739) (ew)

April 30 17 ORDER granting defts motion for an extension of time until 5/7/84 to file its reply to pltfs opposition to motion to dismiss. (N) GREENE, J. (ew)

May 2		NOTICE OF FILING by pltfs of declarations of CHai Feldblum, Jill Gay, Martin Hamilton, Anthony Palomba, Olga Finlay, Nino Pasti, and Richard Parker. (Filed in CA 83-3739). (mj)
May 7	18	MOTION of defts. for leave to file a reply memorandum exceeding the page limit specified in the local rules; Exhibit (reply) (Orig. filed in 83-3739) (ew)
May 9	19	ERRATA by defts. re typographical errors appearing in their reply to pltfs opposition to defts motion to dismiss. (ew)
May 9	20	ORDER granting defts motion for leave to file a reply memorandum exceeding the twenty-five page limit. GREENE, J. (ew)
May 9	21	REPLY by defts. to pltfs opposition to defts motion to dismiss or, alternatively for summary judgment; table of contents; second affidavit of Louis P. Goelz; statement of genuine issues. (ew)
July 6		MOTION of defts. (Held 7/2/84) to dismiss and motion to submit classified affidavits argued and taken under advisement. (Rep: Nicholas Sokal) GREENE, J. (mj)
July 6	22	MEMORANDUM ORDER filed 7/5/84 granting deft's motion for leave to submit in camera three classified affidavits of Secretary Lawrence Eagleburger. (N) GREENE, J. (mj)
July 12	23	NOTICE by defts. of in camera submissions of classified affidavits. (mj)
Jul 17	24	ORDER directing that Mr. Eagleburger's classified affidavits be placed under seal. (N) GREENE, J. (ew)

Jul 31	25	OPINION filed 7/27/84. (N) GREENE, J. (ew)
Jul 31	26	ORDER filed 7/27/84 granting defts motion for summary judgment; dismissing action. (N) GREENE, J. (ew)
Sept 21	27	NOTICE OF APPEAL by pltfs from order entered 7-31-84; $5.00 USDC fee and $65.00 USCA fee paid and credited to U.S. Treasury; copies of notice sent to: Thomas W. Hussey, Esq. (nb)
Sept 26		PRELIMINARY RECORD transmitted to USCA; USCA# 84-5681. (nb)

CRONIN, ET AL.

v.

SHULTZ, ET AL., No. 83-389

1983

Dec 28	1	COMPLAINT; appearance (bb)
Dec 28		SUMMONS (4) issued (bb)
Dec 30	2	INTERROGATORIES (first set) of pltfs to deft William French Smith. (io)
Dec 30	3	INTERROGATORIES (first set) of pltfs to deft George P. Shultz. (io)

1984

Jan 5	4	AFFIDAVIT OF SERVICE upon U.S. Attorney on 12-28-83. (io)
Jan 19	5	AFFIDAVIT OF SERVICE upon U.S. Attorney General by certified mail on 1-5-84; upon deft Shultz by certified mail on 1-6-84; upon deft Nelson by certified mail on 1-6-84; attachments. (io)
Feb 8	6	MEMORANDUM AND ORDER directing deft to file their answer to pltfs complaints or a dispositive motion on or before 3-1-84; staying discovery pending the Court's consideration of such dispositive motion. (Orig. filed in CA 83-3739) (N) GREENE, J. (io)
Mar 1	7	MOTION of deft for leave to file consolidated motion on the merits, and to exceed the page limit specified in the Local Rules; Exhibit (Motion to dismiss or, in the alternative, for summary judgment). (io) (Orig. filed in 83-3739)
Mar	8	PROFFER AND MOTION of defts for leave to submit classified affidavits for

		the Court's in camera inspection; memorandum in support. (Originial filed in 83-3739) (io)
Mar 9	9	MOTION AND MEMORANDUM of pltfs in support thereof for extension of time in which to respond to defts' motions (1) for dismissal or summary judgment and (2) for leave to submit classified affidavits in camera. (Original filed in 83-3739) (io)
Mar 15	10	ORDER filed 3-14-84 granting pltfs' motion for extension of time until 4-16-84 to respond to defts' consolidated alternative motions for dismissal or summary judgment, and motion for leave to submit classified affidavits in camera. (N) GREENE, J. (io)
Apr 6	11	MOTION of pltfs for leave to file a consolidated response to defts' alternative consolidated motions for dismissal or summary judgment and to exceed the page limit specified in the Local Rules. (Orig. filed in CA 83-3739). (io)
Apr 10	12	ORDER granting pltfs' motion for leave to file a consolidated response to defts' alternative motions for dismissal or summary judgment. (N) GREENE, J. (io)
Apr 16	13	MOTION AND MEMORANDUM of pltfs in support thereof for three day extension of time in which to respond to defts' motions (1) for dismissal or summary judgment and (2) for leave to submit classified affidavits in camera. (Orig. filed in CA 83-3739) (io)
Apr 19	14	ORDER filed 4/18/84 granting pltf's motion for an extension of time until April

19, 1984 to file response to defts' consolidated motions for dismissal or summary judgment and motions for leave to submit classified affidavits in camera. (N) GREENE, J. (mj)

Apr 19 15 MEMORANDUM by pltf. in opposition to defts' motion for leave to submit classified affidavits for the court's in camera inspection. (Filed in 83-3739) (mj)

Apr 19 16 OPPOSITION by pltf. to defts' motion to dismiss or, in the alternative, for summary judgment; Memorandum of P & A's; Table of Contents; Table of Authorities; Appendices A and B; Statement of Genuine Issues; Affidavits and Declarations in Opposition to defts' motion to dismiss of Charles S. Sims, James Abourezk; Thomas Borge; Robert L. Borosage; Douglass W. Cassel, Jr; Joseph T. Eldridge; Chai R. Feldblum; Olga Finlay; Marily Flood; Jill Gay; Darlene Gramigna; Martin Hamilton; Thomas H. Holloway; Sidney Lens; Leonor Rodriquez Lezano; Salley McConnell-Ginet; Leonard C. Meeker; Anthony Palomba; Nino Pasti; Barbara Corrado Pope; Anne Posel; David S. Rudstein; Charles E. Schumer; Richard S. Scobie; Philip B. Snyder; Rob Warden; Mortimer B. Zuckerman; Michael Maggio; and James M. Shannon. (Filed in 83-3739) (mj)

Apr 26 17 COPY of MOTION and Memorandum by defendants in support thereof for an

		extension of time in which to reply to pltfs' opposition to the Government's dispositive motion. (Original filed in 83-3739) (vajm)
May 3	18	ORDER filed 4-30-84 granting defts' motion for an extension of time until 5-7-84 to file reply to pltfs' opposition to motion to dismiss. (N) GREENE, J. (io)
May 2	19	NOTICE of City of New York of filing declarations of Chai Feldblum, Jill Gay, Martin Hamilton, Anthony Palomba, Olga Finlay, Nino Pasti, and Richard Parker as part of the record. (Original filed in 83-3739)
May 7	20	MOTION of defts for leave to file a reply memorandum exceeding the page limit specified in the local rules; Exhibit (Reply to pltfs' opposition to defts' motion to dismiss, or, alternatively for summary judgment). (Orig. filed in CA 83-3739) (io)
May 9	21	ERRATA by defts typographical errors appearing in their Reply to Pltfs Opposition to Defts Motion to Dismiss or, Alternatively, for Summary Judgment. (Orig. filed in C.A. 83-3739) (nb)
May 10	22	ORDER filed 5-9-84 granting defts' motion for leave to file a reply memorandum exceeding the twenty-five page limit. (Orig. filed in CA 83-3739) (N) GREENE, J. (io)
May 10	23	REPLY of defts to pltfs' opposition to defts' motion to dismiss or, alternatively, for summary judgment; table of contents; attachment; statement of genuine issues. (Orig. filed in CA 83-3739) (io)

July 2		MOTION of defts. to dismiss and motion to submit classified affidavits argued and taken under advisement. (Rep. N. Sokal) GREENE, J. (mf)
July 6	24	MEMORANDUM ORDER (filed 7/5/84) granting defts' motion for leave to submit *in camera* three classified affidavits of Secretary Lawrence Eagleburger. (N) GREENE, J. (mf)
Jul 12	25	NOTICE by defts. of in camera submission of classified affidavits. (ew)
July 17	26	ORDER directing that Mr. Eagleburger's classified affidavit be placed under seal. (N) GREENE, J. (io)
July 30	27	OPINION filed 7-27-84. (N) GREENE, J. (io)
July 30	28	ORDER filed 7-27-84 granting defts' motion for summary judgment; dismissing action. (N) GREENE, J. (io)
Oct 9	29	NOTICE OF APPEAL (filed 9-21-84) of pltfs from order of 7-27-84; $5.00 filing fee and $65.00 docketing fee paid and credited to U.S. Copie mailed to: Thomas W. Hussey. (io)
Oct 9		PRELIMINARY RECORD transmitted to USCA; USCA 84-5708. (io)

APPENDIX A

March 1, 1982

MEMORANDUM FOR WILLIAM B. WARK
Executive Secretary, Interdepartmental Committee
on Internal Security (ICIS)

Re: The Immigration and Nationality Act
of 1952—Technology Transfer

You have asked for our opinion regarding whether the Immigration and Nationality Act of 1952 authorizes the denial of visas where there is reason to believe that the issuance of a visa may result in exposure to the foreign visitor of technology that is otherwise protected from transfer to foreign persons by U.S. law. We conclude that, under certain circumstances, visas may be denied pursuant to 8 U.S.C. § 1182(a) (27) in order to prevent illegal technology transfers but that this determination requires careful consideration of the facts and circumstances of each case based on established guidelines. An interagency group should be convened to recommend such guidelines and the process by which they will be applied.

Section 212(a) (27) of the act [8 U.S.C. § 1182(a) (27)] reads as follows:

> Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States:
>
> * * * * *
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or inciden-

tally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;

* * * *

Your question raises two issues concerning this provision: (1) whether adverse technology transfer consequences may properly be taken into account in determining whether an alien's activities would be "prejudicial to the public interest, or endanger the welfare, safety, or security of the United States"; and (2) if so, what facts are necessary to trigger this paragraph, thereby rendering an alien inadmissible to the United States.

I.

With respect to the first issue, the legislative history relating directly to the passage of the Immigration and Nationality Act of 1952 can be read as limiting application of section 212(a) (27) to cases where the foreign visitor poses a threat to the internal security of the U.S. However, it is also necessary to consult the legislative history of the Subversive Activities Control Act of 1950 (SACA), 64 Stat. 987, since the language of section 212(a) (27) was taken almost verbatim from section 22 of that Act. In summary, Congress' choice of language in the SACA is instructive, particularly its use of the phrase "prejudicial to the public interest," because that phrase had a well-settled administrative interpretation in 1950.

Prior to enactment of the SACA, Congress had authorized the President to impose additional restrictions on the entry of persons into the United States during times of war or national emergency.[1] In Proclamation 2523, 3 CFR 270 (1943 Cum. Supp.), the President declared that an alien

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[1]Act of May 22, 1918, 40 Stat. 559, as amended by the Act of June 21, 1941, 55 Stat. 252, hereinafter referred to as the Passport Control Act of 1918.

would not be permitted to enter if his entry would be "prejudicial to the interests of the United States," as provided in regulations to be promulgated by the Secretary of State in consultation with the Attorney General. Proclamation 2523 and the regulations issued by the Secretary of State,[2] which were still in effect at the time, were discussed in the Senate Report that first proposed the SACA as part of the body of immigration law upon which Congress was building. S. Rep. No. 2230, 81st Cong., 2d Sess. 22 (1950). Thus, the prohibition in section 212(a) (27) against the entry of aliens when there is reason to believe they intend to engage in activities "prejudicial to the public interest" appears to be a direct descendant of Presidential Proclamation 2523 and its implementing regulations.[3] Those regulations listed eleven categories of aliens who were inadmissible on the ground that their entry would be "prejudicial to the public interest" or "prejudicial to the interests of the United States," one of which is relevant to the question of the extent to which technology transfer may be the basis for denying entry. The regulations provided:

> § 175.53 *Classes of aliens whose entry is deemed to be prejudicial to the public interest.* The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States . . .
>
> * * *
>
> (d) Any alien engaged in activities designed to obstruct, impede, retard, delay, or *counteract* the effectiveness of the *measures adopted by the*

[2] 8 CFR 175.53 (1949).

[3] April 11, 1977 memorandum to Commissioner Leonard F. Chapman, Immigration and Naturalization Service, from Acting Assistant Attorney General John M. Harmon, Office of Legal Counsel.

Government of the United States for the defense of the United States . . . . (Emphasis supplied.)

This particular category is instructive because it indicates that section 212(a)(27) cannot be read as limited to classic internal security cases, i.e., those which involve persons who believe in or advocate objectionable doctrines, but may be extended to include any alien who attempts to circumvent measures adopted by the United States for the defense of the country even in the absence of war or national emergency.[4]

Such measures were adopted by the Congress in the Export Administration Act of 1979.[5] Congress specifically recognized the need to control exports of technology that could made a significant contribution to the military potential of any country that would be detrimental to the national security of the United States.[6] Declaring that it was the policy of the United States to restrict the export of goods and technology in order to avoid detrimental effects on the national security,[7] the Congress authorized a regulatory and licensing framework to control the export of critical technology and legislated both civil and criminal penalties for violation of the Act or any regulation, order, or license issued thereunder.[8] It seems clear that activities prohibited by statute in the interests of the national security, which includes the national defense, would fall within

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[4] The language of the Passport Control Act of 1918, from which the authority for the State Department regulations flowed, is quite similar to that included in the SACA, from which section 212(a)(27)'s language was taken. The major difference is that the Passport Control Act provision, unlike that in the SACA, is limited to time of war or national emergency.

[5] 50 U.S.C. App. § 2401 *et seq.*

[6] *Id.* § 2401(5) and (8). The term "national security" is used to include considerations of national defense. *See, e.g.*, E.O. 12065, § 6-104.

[7] 50 U.S.C. App. § 2402(2) (A).

[8] *Id.* § 2410.

the purview of the phase "activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States," as it was understood in 1952 when the Immigration and Nationality Act was enacted.

We believe, moreover, that our conclusion as to the applicability of section 212(a)(27) to prevent technology transfer would be valid even in the absence of a well-settled administrative meaning for that phrase in 1952. Certainly actions that are prohibited by a licensing scheme designed to protect the national security and punishable under a criminal provision to enforce the regulatory framework must be regarded as activities that Congress would agree should be considered to be prejudicial to the public interest and to endanger the security of the United States.

> Even in briefest outline [the legislative controls on aliens who seek to enter the United States] are manifestly complex, redundant, and frequently obscure. But the very prolixity of these legislative expressions is evidence of the urgent desire of Congress to shut the gates of America against aliens who may seek to undermine the national strength and safety.

C. Gordon, *The Immigration Process and National Security*, 24 Temp. L. Q. 302, 307 (1951).

II.

Having determined that adverse technology transfer consequences may be taken into account in determining whether an alien is excludable under section 212(a) (27) of the Act, we turn to the question of what facts are necessary to trigger this paragraph, thereby rendering an alien inadmissible to the United States. This question is difficult to consider in the absence of specific cases. It is a mixed question of law and fact requiring the expertise of

intelligence and export control enforcement personnel, and should be the subject of further discussions between the State and Justice Departments and other interested entities. As a general matter, however, we note that the only inquiry to be made under paragraph (27) is whether there is "reason to believe" that an alien seeks "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest . . . or endanger the . . . security of the United States."

Obviously, the mere fact that a businessman or scientist might be exposed to controlled technology while in the United States, standing alone, is not enough to trigger section 212(a) (27). The law as framed seems to permit findings of ineligibility under this section only as to persons whom we have reason to believe intend to engage in proscribed activities. Nevertheless, there is no "probability" requirement in paragraph (27). It requires exclusion if the Attorney General or consular officer "has reason to believe" that an alien seeks entry into the United States even "incidentally" to engage in activities prejudicial to the security of the United States. Clearly, this standard encompasses those visitors who have a substantial connection to a foreign hostile intelligence service, *i.e.*, known intelligence officers or reliably identified co-optees of a hostile intelligence service.[9] In our opinion, however, paragraph (27) may come into play even where there is no substantial connection to an intelligence service if prudent experts can point to articulable facts which, taken together with rational inferences from those facts, reasonably warrant the belief than an alien seeks to enter this country to acquire controlled technology. We believe, for example, that where an alien seeks admission to attend a conference, including those aspects of the conference that will

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[9] Memorandum from Associate Attorney General Michael J. Egan to Deputy Secretary of State Warren M. Christopher and FBI Director William H. Webster, dated January 30, 1979.

include controlled technology, sufficient grounds may well exist for his exclusion. Likewise, actions of an alien on previous visits, or a known pattern and practice of certain groups of aliens, can often be valid indicators of future intentions and may be considered in determining whether such person is admissible.[10]

The determination of admissibility, however, must be made on a case-by-case basis. As noted above, all of the problems associated with that determination cannot be resolved in the abstract, and general guidelines should be the subject of interagency discussion prior to any case-by-case review. Nevertheless, our conclusion that paragraph (27) contains a relatively low "standard of proof" is surprised by the legislative history of the Immigration and Nationality Act of 1952. A 1950 Senate report found that

> "*wider discretion* should be granted to those charged with administering the laws relating to the entry of aliens into this country to deny admission to those aliens who are known or there is reason to believe will, or would be likely to engage in any activity subversive to the National Security . . . ." (Emphasis supplied.)

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[10] There are obvious differences between these situations and the classic situation involving a known or suspected operative of a hostile foreign intelligence service that is the subject of the DoJ memorandum cited in footnote 9 and of the interagency committee (the Egan Committee) that was established to consider such cases. Where a particular case does not meet the criteria of the "spy" cases, i.e., a substantial connection with a foreign hostile intelligence service, the objection is really to access to controlled technology rather than travel generally in the United States. Because of that difference, the possibility as well as the effectiveness of placing restrictions on the visa, rather than total exclusion, should be explored. The purpose, length and itinerary of a proposed visit under these circumstances can be valid indicators of the probability or possibility that the applicant seeks to enter this country to engage in "prejudicial activities."

S. Rep. No. 1515, 81st Cong., 2d Sess. 800 (1950).[11]

III.

Two additional observations concerning section 212(a)(27) are appropriate. First, unlike paragraph (28), the Attorney General does not have discretion to waive the exclusion requirement under paragraph (27). Once an alien is found to fall within the purview of paragraph (27), he may not be admitted, and other aliens in identical circumstances must also be excluded, even where their presence might be beneficial for other reasons. This consideration should also be the subject of some deliberation when interagency meetings take place to determine what facts will trigger paragraph (27) in technology transfer cases.

Second, because paragraph (27) cannot be waived by the Attorney General, exclusion under this paragraph is not reviewable by the courts. The unadmitted and nonresident alien has no constitutional right of entry into the United States as a nonimmigrant or otherwise.[12] "The [Supreme] Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.' "[13] The courts generally recognize that power to protect the country against foreign dangers is to be exercised exclusively by the political branches of

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[11] S. Rep. No. 1515 contained the basic findings to support the Immigration and Nationality Act of 1952. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 27 (1952). It is, therefore, especially instructive in interpreting that Act even though it was prepared in a prior Congress.

[12] *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904), cited with approval in *Kliendienst* v. *Mandel*, 408 U.S. 753 at 762 (1972).

[13] *Kleindienst* v. *Mandel, supra* note 12, at 766 (citations omitted).

government.[14] Likewise, it is our view that, absent discretion to waive the exclusion requirement, a determination of inadmissibility would be unreviewable even where the plaintiffs are U.S. citizens asserting their own First Amendment rights to have an alien enter and to hear him explain and seek to defend his views. Cf. *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972).

IV.

In conclusion, we believe that visas may be denied pursuant to 8 U.S.C. § 1182 (a) (27) in order to prevent illegal technology transfers. While the criteria used to determine ineligibility for entry must be directly related to the determinations required to be made by the terms of paragraph (27), that paragraph falls far short of requiring probable cause to believe an alien will engage in proscribed activities upon entry to the United States. We recommend, however, that guidelines similar to those that govern the deliberations of the Egan Committee be established with regard to the application of paragraph (27) to visa applicants for reasons of technology transfer.

/s/ MARY C. LAWTON
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Office of Intelligence Policy and Review

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[14] *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893). Since 1893 the Court has on numerous occasions reaffirmed this principle. Some examples of these general reaffirmations are set forth in the *Mandel* case, *supra* note 12, at 766 n. 6.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CHAI FELDBLUM, 38 Myrtle Avenue, Cambridge, Massachusetts 02138, (617) 495-3139;	) COMPLAINT) FOR) INJUNCTIVE) AND) DECLARA-
JILL GAY, 1901 Q Street, N.W., Washington, D.C. 20009, (202) 234-9382;	) TORY RELIEF
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THE NEW COLLEGE OF CALIFORNIA,
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(415) 626-1694;

Plaintiffs,

v.

GEORGE P. SHULTZ, Secretary of State, Department of State,
Washington, D.C. 20520;

WILLIAM FRENCH SMITH, Attorney General;
Department of Justice,
Washington, D.C. 20530; and

ALAN C. NELSON, Director of the Immigration and Naturalization Service, 425 I Street, N.W.,
Washington, D.C. 20536,

Defendants.

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief challenging defendants' refusal to grant a visa to two Cuban women, Olga Finlay and Leonor Rodriquez Lezcano, for a lecture tour and meetings on issues of particular interest to women. It is brought by individuals and groups interested in such issues and in Latin American and Carribean Studies. To educate themselves further about Cuban society and the role of women in Cuba, plaintiffs

invited Ms. Finlay and Ms. Lezcano to speak and meet with them, in the United States, about these subjects. The only asserted basis for their exclusion from the United States is defendants' claim that the Cuban women's speeches in America would be "prejudicial to the public interest" because of defendants' objections to their political beliefs and associations. As a result of that determination, reaffirmed on October 21, 1983, the unique perspective that Mrs. Finlay and Ms. Lezcano can offer on the role of women in contemporary Cuba has been barred from this country.

2. The exclusion of Ms. Finlay and Ms. Lezcano from the United States is not an isolated event. Rather, the defendants have employed the visa power to shape and limit political debate within the United States. The purpose and effect of this policy has been to deny Americans the opportunity to hear and meet with significant and respected critics of American policy, and advocates of policies and social systems which differ from ours. Such a pattern and practice of ideological exclusions is inconsistent with the basic premises of a free society. Defendant's actions in this regard violate Congressional intent as well as the constitutional guarantees of free speech and assembly embodied in the First Amendment.

JURISDICTION AND VENUE

3. Jursidiction is properly vested in this Court pursuant to 28 U.S.C. §§1331 and 1361 and 8 U.S.C. §1329, over causes of action arising under 8 U.S.C. §1182 (a) (27), 5 U.S.C. §702, and the First and Fifth Amendments to the Constitution.

4. The venue of this action lies in this district under the provisions of 28 U.S.C. §1391 (e).

PLAINTIFFS

5. The City of New York is a municipal corporation which has the power to sue on its own behalf and on behalf of its constituent agencies. One of its agencies is the Commission on the Status of Women, which was established in 1975 in order to, *inter alia*, conduct research and investigations into the status of women in the City and elsewhere in order to recommend institutional changes. On September 7, 1983, the Commission invited Ms. Finlay and Ms. Rodriquez to meet with its members, staff and other interested citizens of New York City to discuss such issues concerning women as day care and the role of women in Cuban society.

6. Edna Acosta-Belen is the Chair of the Puerto-Rican, Latin-American Caribbean Studies Program at the State University of New York at Albany, an undergraduate and graduate academic program in Puerto Rican, Latin-American and Caribbean Studies. On behalf of the Program, she issued a speaking invitation to Ms. Finlay and Ms. Rodriquez on September 20, 1983.

7. Chai Feldblum is affiliated with the Women's Law Association of Harvard Law School, an association chartered by Harvard Law School to provide services and information to women at Harvard. On behalf of the Association, she issued a speaking invitation to Ms. Finlay and Ms. Rodriguez on September 28, 1983.

8. Jill Gay is the Associate Director of the Third World Women's Project of the Institute for Policy Studies, an organization that sponsors Third World women to engage in dialogue with American groups. On behalf of the Project, she issued a speaking invitation to Ms. Finlay and Ms. Rodriguez on or about September 15, 1983.

9. Thomas H. Holloway is the Director of the Cornell University Latin American Studies Program, an interdisciplinary program coordinating and promoting Latin American studies initiatives at Cornell. On behalf of the

Program, he issued a speaking invitation to Ms. Finlay and Ms. Rodriquez on September 8, 1983.

10. Sally McConnell-Ginet is the Director of the Cornell University Women's Studies Program an interdisciplinary program concerned with teaching and research concerning the status of women. On behalf of the Program, she issued a speaking invitation to Ms. Finlay and Ms. Rodriguez on September 8, 1983.

11. Barbara Corrado Pope is Director of the Women's Studies Program at the University of Oregon. On behalf of the Program, she issued a speaking invitation to Ms. Finlay and Ms. Rodriguez on October 13, 1983.

12. David S. Rudstein is a Professor of Law and Associate Dean at the Chicago-Kent College of Law of the Illinois Institute of Technology. On behalf of the law school, he issued a speaking invitation to Ms. Finlay and Ms. Rodriguez on October 13, 1983.

13. Mary Kay Vaughan is the Director of the Latin American Studies Program of the University of Illinois at Chicago, a research and teaching program that focuses on Latin America and Hispanics in the United States. On behalf of the program, she issued a speaking invitation to Ms. Finlay and Ms. Rodriguez some time in October, 1983.

14. The Committee on Religion, Ethics and Social Policy is an independent, tax-exempt educational institution that promotes programs to investigate the interrelationship of values, ethics and public policy. It issued a speaking invitation to Ms. Finlay and Ms. Rodriguez on August 12, 1983.

15. The Committee on U.S.-Latin American Relations is a student organization at Cornell University that conducts public education on Latin America and the influence there of United States foreign policy. It issued a speaking invitation to Ms. Finlay and Ms. Rodriguez on August 12, 1983.

16. The Institute for Policy Studies is an independent research organization and educational institute established in 1963. It issued a speaking invitation to Ms. Finlay and Ms. Rodriguez on or about September 15, 1983.

17. The New College of California is a four-year independent liberal arts college with professional programs in law and graduate psychology. It issued a speaking invitation to Ms. Finlay and Ms. Rodriguez on September 15, 1983.

DEFENDANTS

18. George P. Shultz is the Secretary of State of the United States and the executive head of the Department of State. In that capacity and through his agents, he issues non-immigrant visas under 8 U.S.C. § 201 (a) (2) and determines ineligibility for receiving such visas under 8 U.S.C. § 1182 (a) (27). Defendant Shultz is sued solely in his official capacity.

19. William French Smith is the Attorney General of the United States. In that capacity and through his agents, he exercises the power to bar visitors to the United States, including those who receive visas from the Secretary of State, under 8 U.S.C. § 1182 (a) (27) and otherwise. Defendant Smith is sued solely in his officia! capacity.

20. Alan C. Nelson is the Commisssioner of the Immigration and Naturalization Service. In that capacity and through his agents, he exercises the power to bar visitors to the United States, including those who receive visas from the Secretary of State. Defendant Nelson is sued soley in his official capacity.

STATEMENT OF THE CASE

21. Olga Finlay is a Cuban lawyer who since 1980 has represented the Federation of Cuban Women at international organizations. She is the author of "Cuban Women:

1975-1979", "The Rights of Children in Cuba" in *Children of Cuba: Twenty Years,* and a forthcoming monograph on the legal rights of children of Cuba, and collaborated with the noted American sociologist C. Wright Mills on a book concerning the Cuban Revolution, *Listen, Yankee.* In 1979, she was secretary of the Cuban committee established as part of UNICEF's International Year of the Child. In 1977, she was the Cuban representative to the United Nations Commission on the Status of Women. She is currently the President of the advisory workgroup of the Federation of Cuban Women. The topics on which Ms. Finlay was to speak in the United States included Women in Cuba; Children in Cuba; The Family Code (the legal code which requires both husband and wife to share equally the burdens of housework and childrearing); and the Legal Rights of Children in Cuba.

22. Leonor Rodriquez Lezcano is a Black Cuban woman who is the Secretary of Foreign Relations for the Federation of Cuban Women. She is an elected union representative of her workplace. She graduated in 1974 from the University of Havana where she engaged in research on life in isolated rural villages. She was to speak in the United States on the subject, "Black Women in Cuba."

23. In the summer of 1983, the Institute for Policy Studies invited Ms. Finlay and Ms. Lezcano to visit the United States to speak on women's issues and women in Cuba. IPS undertook to organize a speaking tour for both women to lecture at various church, university, women's and political groups in different parts of the United States.

24. Plaintiffs, and other American individuals and groups, arranged meetings and lectures at which Ms. Finlay and Ms. Lezcano would speak and meet with them to discuss the situation of women and children in Cuba,

the situation of black women in Cuba, Cuban society in general, and issues of mutual concern.

25. Shortly after receiving these invitations, Ms. Finlay and Ms. Lezcano applied to the United States Interests Section in Havana, Cuba for an entry visa. On their applications, they indicated the general purpose of their visit and that they intended to remain in the United States for a brief time only.

26. In the fall of 1983, the applications for visas were officially denied under Section 212 (a) (27) of the Immigration and Nationality Act. 8 U.S.C. § 1182 (a) (27). That section renders ineligible for visas

> [a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States.

27. In response to subsequent letters of inquiry from Holloway, IPS and other invitors, the State Department clarified the basis for its decision by stating that "their visit to the United States would have been prejudicial to the public interest by providing these two officials with forums for propagating Cuban policies before U.S. audiences." The State Department declared that any future applications "will be considered in light of the intended purpose of their visit" noting that "visits which are primarily for sport or cultural purposes are exempted" from the restriction on which it was relying.

28. Ms. Finlay lived in the United States from 1944, when she was four, through 1959. She attended school in New York, first at the Dominican Academy, then at Blessed Sacrament High School. She returned to Cuba in 1961, and has travelled to the United States frequently since that time. At no time during her earlier travels for the purpose of attending conferences and carrying out

speaking engagements in the United States has she been denied a United States visa, or been advised by a consular officer or the State Department or the Attorney General or other government officials that her presence in the United States would be prejudicial to the public interest or that she was otherwise ineligible to receive a visa. At no time during such earlier travels for the purpose of engaging in conferences and carrying out speaking engagements did she engage in any conduct that could properly be regarded as prejudicial to the public interest within the meaning of Section 212 (a) (27), or as violative of any provision of law, including the Immigration and Nationality Act.

29. The defendants do not in fact know or have reason to believe that Ms. Finlay or Ms. Lezcano plan to or would engage in any activities within the United States on their proposed visits that would be prejudicial to the public interest or endanger the welfare, safety or security of the United States or would otherwise be in violation of the Immigration and Nationality Act.

30. Upon information and belief, the defendants denied the women visas because of their political beliefs and associations and the presumed content of their speech in the United States.

31. Upon information and belief, the denial of a visa to the two women is part of a pattern and practice by defendants of denying visas to foreign critics of American policy in Latin America and elsewhere to proponents of the government and social system now existing in Cuba, and more generally to proponents of systems other than ours.

32. Defendants' exclusion of Ms. Finlay and Ms. Lezcano from the United States is not authorized by Section 212 (a) (27), and is not based on legitimate, lawful and bona fide reasons.

33. The invitations IPS and the other invitors have extended to Ms. Finlay and Ms. Lezcano are open and con-

tinuing and the two women have accepted the invitations on a continuing basis, contingent upon the granting of visas.

34. Defendants' actions in this case have caused and continue to threaten irreparable damage to plaintiffs' First Amendment rights to meet and exchange views with foreign critics of United States foreign policies and advocates of differing social systems, and to educate themselves about some of the most critical issues facing America today.

35. Defendants' actions in this case are arbitrary and capricious.

36. Plaintiffs lack any adequate remedy at law.

CAUSES OF ACTION

37. Defendants' actions in this case are not authorized by section 212 (a) (27) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (a) (27), which bars any alien who seeks "to enter the United States solely, principally, or incidentally to engage in *activities* which would be prejudicial to the public interest or endanger the welfare, safety or security of the United States" (emphasis added). It neither contemplates nor permits the exclusion of aliens based on political beliefs or associations or the anticipated content of an alien's political speech in the United States.

38. Defendants' refusal to grant Ms. Finlay and Ms. Lezcano a visa is not based on any knowledge or "reason to believe" that they seek "to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." Absent such knowledge or reason to believe, defendants' actions exceed their statutory authority under section 212 (a) (27) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (a) (27).

39. For the reasons recited above, defendants' refusal to grant the two women visas to meet with and speak to

plaintiffs in the United States is arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

40. Insofar as section 212 (a) (27) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (a) (27), is construed to permit the exclusion of aliens on the basis of their political associations or the political speech in which they would engage were they admitted, it constitutes a vague, overbroad and standardless delegation of authority to the Executive branch to curtail political debate in the United States on the basis of content in violation of the First Amendment.

41. Defendants' exclusion of the two women from the United States abridges the right of plaintiffs, as well as others in this country, to meet, discuss and exchange ideas on subjects of vital national interest, in violation of the First Amendment.

42. Defendants' application to this case of section 212 (a) (27) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (a) (27), is part of a pattern and practice of ideological exclusions by the Executive branch which has limited the opportunities for citizens in this country to meet, discuss and exchange ideas with foreigners holding views opposed by the defendants, in violation of the First Amendment.

43. Defendants' application of 8 U.S.C. 1182 (a) (27) to bar certain aliens who seek visas to engage in political speech in the United States, but not to bar those same aliens or persons similarly situated who seek visas for sport, cultural or other non-political purposes, denies plaintiffs the equal protection of the laws and violates the First Amendment.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief against the defendants, their successors and subordinates:

a) A declaration that defendants' refusal to grant Ms. Finlay and Ms. Lezcano entry visas is not authorized by section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), and violates the free speech guarantee of the First Amendment and the equal protection guarantee of the Fifth Amendment;

b) An order directing defendants to issue Mrs. Finlay and Ms. Lezcano appropriate entry visas so that they may accept the invitations proffered by plaintiffs and other groups in this country who wish to hear their views;

c) An injunction prohibiting defendants from continuing to interpret and apply section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), in a manner that is inconsistent with the terms and intent of the statute and which violates the guarantees of the First Amendment;

d) Such other and further relief as this Court deems just and proper; and

e) The costs and attorneys' fees incurred in this action.

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Attorneys for Plaintiffs

DECEMBER 15, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JUDITH FREIWIRTH, 54 Foster Road, Belmont, Massachusetts 02178 (617) 484-3925;	)	
ANTHONY PALOMBA, 43 Custer Street, Jamaica Plain, Massachusetts 02130 (617) 552-4737;	)	
MOBILIZATION FOR SURVIVAL, 853 Broadway, New York, New York 10003 (212) 533-0008;	)	
BOSTON MOBILIZATION FOR SURVIVAL, 727 Massachusetts Cambridge, Massachusetts 02139 (617) 354-0008;	)	CIVIL ACTION NO. 83-3895

NEW ENGLAND CAMPAIGN TO STOP THE EUROMISSILES, 2161 Massachusetts Avenue, Cambridge, Massachusetts 02140 (617) 492-6446;	) COMPLAINT) FOR INJUNC-) TIVE AND) DECLAR-) ATORY) RELIEF
Plaintiffs,	))
v.	
GEORGE P. SHULTZ, Secretary of State, Department of State, Washington, D.C. 20520;	))))
WILLIAM FRENCH SMITH, Attorney General, Department of Justice, Washington, D.C. 20530; and	)))))
ALAN C. NELSON, Director of the Immigration and Naturalization Service, 425 I Street, N.W., Washington, D.C. 20536,	)))))
Defendants.	))

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief challenging defendants' refusal to grant a visa to Nino Pasti, a former member of the Italian Senate, former North Atlantic Treaty Organization (NATO) General, and public critic of the recent placement of Pershing II and Cruise missiles by the United States in Europe. It is brought by interested Americans vitally concerned about United States policies concerning nuclear weapons and nuclear disarmament. To educate themselves further about those issues, and to convince other Americans that current American policy is misguided and dangerous to the continuation of the human species on this planet, plaintiffs either arranged or planned to attend speaking engagements in the United States by Senator Pasti concerning American nuclear weapons policies, which were scheduled to coincide with similar meetings and demonstrations throughout Europe and the United States during the weekend of October 21-24, 1983. The only asserted basis for Senator Pasti's exclusion from the United States is that, in defendants' view, his speech here would be "prejudicial to the public interest". As a result of that determination, the unique and important perspective that Senator Pasti can offer plaintiffs and other American citizens on United States nuclear weapons policy has been barred from this country at the very time when that subject is a matter of intense national debate.

2. The exclusion of Senator Pasti from the United States for ideological reasons is not an isolated event. Rather, the defendants have employed their visa authority to shape and limit political debate within the United States. The purpose and effect of this policy has been to deny Americans the opportunity to hear and meet with significant and respected critics of American policy, and advocates of policies which differ from ours. Such a pattern and practice of ideological exclusions is inconsistent

with the basic premises of a free society. Defendants' actions in this regard violate congressional intent as well as the constitutional guarantees of free speech and assembly embodied in the First Amendment.

JURISDICTION AND VENUE

3. Jurisdiction is properly vested in this Court pursuant to 28 U.S.C. §§ 1331 and 1361 and 8 U.S.C. § 1329, over causes of action arising under 8 U.S.C. § 1182(a)(27), 5 U.S.C. § 702, and the First and Fifth Amendments to the Constitution.

4. The venue of this action lies in this district under the provisions of 28 U.S.C. § 1391(e).

PLAINTIFFS

5. Mobilization for Survival ("Mobilization") is a New York not-for-profit corporation located in New York City which advocates the multilateral abolition of all of nuclear weapons. The Mobilization works with affiliated similar groups throughout the United States by helping them to acquire and schedule speakers like Senator Pasti for public demonstrations, teach-ins, and other meetings. Plaintiff Mobilization has invited Senator Pasti to come to the United States to speak at a series of events, such as the Boston meeting at which defendants prevented him from speaking, concerning the dangers Euromissiles pose to world peace and humanity. Senator Pasti has accepted that invitation, contingent on securing a visa.

6. Bruce Cronin is a citizen of the United States and New York who is disarmament coordinator for plaintiff Mobilization. He planned to attend the October 23 demonstration in Boston and to hear Senator Pasti there, and plans to meet with and hear Senator Pasti when and if he is granted a visa to enter the United States to speak on Euromissiles. Mr. Cronin seeks to have an opportunity to

hear Senator Pasti speak in the United States on the subject of Euromissiles and to have an opportunity to meet with and question him because he believes that his own understanding of this issue and hence his ability to participate in the debate concerning nuclear weapons policies would be enhanced by exposure to Senator Pasti's special knowledge, expertise, and experience as a former NATO General. Mr. Cronin also believes that Senator Pasti's public speech in the United States concerning Euromissiles would, in light of his experience and background, lend a credibility which would enhance the adoption of the nuclear weapons policies Mr. Cronin is working to enact into law.

7. The Boston Mobilization for Survival is an unincorporated association in Cambridge, Massachusetts affiliated with plaintiff Mobilization. The Boston Mobilization is a member of the New England Campaign to Stop the Euromissiles, the coalition which sponsored the October 23, 1983 demonstration in Boston at which Senator Pasti was to speak.

8. Anthony Palomba is a citizen of the United States and Massachusetts who is staff person for Boston Mobilization. He planned large portions of the October 23 demonstration in Boston, and intended to hear Senator Pasti speak. He wishes to meet with Senator Pasti, to exchange information and ideas with him, and to hear him speak. He also believes that his capacity to advance his political goals concerning the abolition of nuclear weapons is impeded by defendants' refusal to permit Senator Pasti to speak publicly to and meet with Americans about current American nuclear weapons policies. He plans to meet with, hear, and sponsor speeches by Senator Pasti when and if he is granted a visa to speak in the United States.

9. The New England Campaign to Stop the Euromissiles is an unincorporated coalition of various citizens groups throughout New England concerned about

United States nuclear weapons policies and active in trying to change them through the political process. The New England Campaign was the principal sponsor and organizer of the Boston October 23 demonstration, and invited Senator Pasti to speak at it.

10. Judith Freiwirth is a citizen of the United States and Massachusetts who staffs plaintiff New England Campaign. She was program coordinator of and planned to attend the October 23 demonstration. She wishes to hear Senator Pasti speak and to exchange information and ideas with him in person. She also believes that her capacity to advance her political goals is impeded by defendants' refusal to permit Senator Pasti, under her sponsorship, to speak publicly to and meet with Americans about current American nuclear weapons policies. She plans to meet with, hear, and sponsor speeches by Senator Pasti when and if he is granted a visa to speak in the United States.

DEFENDANTS

11. George P. Shultz is the Secretary of State of the United States and the executive head of the Department of State. In that capacity and through his agents, he issues non-immigrant visas under 8 U.S.C. § 201(a)(2) and determines ineligibility for receiving such visas under 8 U.S.C. § 1182(a)(27). Defendant Shultz is sued solely in his official capacity.

12. William French Smith is the Attorney General of the United States. In that capacity and through his agents, he exercises the power to bar visitors to the United States, including those who receive visas from the Secretary of State, under 8 U.S.C. § 1182(a)(27) and otherwise. Defendant Smith is sued solely in his official capacity.

13. Alan C. Nelson is the Commissioner of the Immigration and Naturalization Service. In that capacity and through his agents, he exercises the power to bar visitors to

the United States, including those who receive visas from the Secretary of State. Defendant Nelson is sued solely in his official capacity.

STATEMENT OF THE CASE

14. Largely through his service as a General in the Italian Army, and his assignment in that capacity to the staff of NATO for a period of time, Senator Pasti has a longstanding and thorough knowledge concerning nuclear weapons and nuclear weapons polices. From 1963 to 1966, Senator (then General) Pasti was the Italian member of the NATO Military Committee, and in that capacity was stationed in and working in the Pentagon. He has visited the United States frequently since that time. In the summer of 1983, Senator Pasti received the invitations described above to meet in the fall of 1983 with plaintiffs and other Americans from a wide range of backgrounds and to discuss with them and provide them information on American nuclear weapons policies and the disarmament problem in general.

15. For the purpose of accepting those invitations, Senator Pasti applied for a visa in the summer of 1983 to visit the United States temporarily, in late October, for the stated purpose of meeting and speaking with the press and with individuals and groups concerned about the direction of American nuclear weapons policies and the placement of American nuclear weapons in Europe.

16. Plaintiffs had invited Senator Pasti for that period and had scheduled speeches for him on the weekend of October 21, 1983 because that was the date for similar demonstrations and meetings planned throughout the United States and Western Europe. Senator Pasti's speeches to plaintiffs and to those other Americans whom they sought to persuade by his knowledge and expertise would have been of particular importance had they been uttered in the United States during that weekend.

17. In October, 1983, Senator Pasti was notified in Rome that his visa was officially denied under Section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27). That section renders ineligible for visas

> [a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States.

18. The invitations extended to Senator Pasti by plaintiffs and others are open and continuing and Senator Pasti has accepted the invitations on a continuing basis, contingent on the granting of a visa.

19. On information and belief, had Senator Pasti sought a visa to enter the United States for sport, cultural or other non-political purposes, or to support American nuclear weapons policies, his visa would have been granted.

20. The defendants do not in fact know or have reasons to believe that Senator Pasti plans to or would engage in any activities within the United States on his proposed visits that would be prejudicial to the public interest or endanger the welfare, safety or security of the United States or would otherwise be in violation of the Immigration and Nationality Act.

21. Upon information and belief, the defendants denied Senator Pasti a visa because of his political views and the expected content of his speech in the United States.

22. Upon information and belief, the denial of a visa to Senator Pasti is part of a pattern and practice by defendants of denying visas to foreign critics of American foreign poiicies, particularly those critics with special knowledge or credibility.

23. Upon information and belief, the denial of a visa to Senator Pasti is only one aspect of the government's pattern and practice of unlawfully curtailing the information available on foreign affairs to American citizens by a variety of means.

24. Defendants' exclusion of Senator Pasti from the United States is not authorized by Section 212(a)(27), and is not based on legitimate, lawful and bona fide reasons.

25. Defendants' actions in this case have caused and continue to threaten irreparable damage to plaintiffs' First Amendment rights as citizens and voters to meet, converse and inform themselves about some of the most critical issues facing America today.

26. Defendants' actions in this case are arbitrary and capricious.

27. Plaintiffs lack any adequate remedy at law.

CAUSES OF ACTION

28. Defendants' actions in this case are not authorized by section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), which bars any alien who seeks "to enter the United States solely, principally, or incidentally to engage in *activities* which would be prejudicial to the public interest or endanger the welfare, safety or security of the United States" (emphasis added). It neither contemplates nor permits the exclusion of aliens based on political beliefs or associations or the anticipated content of an alien's political speech in the United States.

29. Defendants' refusal to grant Senator Pasti a visa is not based on any knowledge or "reason to believe" that he seeks "to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." Absent such knowledge or reason to believe, defendants' actions exceed their statutory authority under section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27).

30. For the reasons recited above, defendants' refusal to grant Senator Pasti a visa to speak in the United States is arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

31. Insofar as section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), is construed to permit the exclusion of an alien on the basis of his political associations or the political speech in which he would engage were he admitted, it constitutes a vague, overbroad and standardless delegation of authority to the Executive branch to curtail political debate in the United Staes on the basis of content in violation of the First Amendment.

32. Defendants' exclusion of Senator Pasti from the United States abridges the right of plaintiffs, as well as others in this country, to meet, discuss and exchange ideas on subjects of vital national interest, in violation of the First Amendment.

33. Defendants' application to this case of section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), is part of a pattern and practice of ideological exclusions by the Executive branch which has limited the opportunities for citizens in this country to meet, discuss and exchange ideas with foreigners holding controversial views, in violation of the First Amendment.

34. Defendants' application of 8 U.S.C. § 1182(a)(27) to bar certain aliens who seek visas to engage in political speech opposing certain United States policies, but not to bar those same aliens or persons similarly situated who seek visas for sport, cultural or other non-political purposes, or who support United States policies, constitutes a content-based discrimination in violation of the First Amendment and denies plaintiffs the equal protection of the laws.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief against the defendants, their successors and subordinates:

a) A declaration that defendants' refusal to grant Senator Pasti an entry visa is not authorized by section 212 (a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), and violates the free speech guarantees of the First Amendment;

b) An order directing defendants to issue Senator Pasti an appropriate entry visa so that he may accept the invitations proffered by plaintiffs and other groups in this country who wish to hear his views;

c) An injunction prohibiting defendants from continuing to interpret and apply section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), in a manner that is inconsistent with the terms and intent of the statute and which violates the guarantees of the First Amendment;

d) Such other and further relief as this Court deems just and proper; and

e) The costs and attorneys' fees incurred in this action.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3739

JAMES ABOUREZK, ET AL., PLAINTIFFS,

v.

RONALD WILSON REAGAN, ET AL., DEFENDANTS.

Civil Action No. 83-3741

CITY OF NEW YORK, ET AL., PLAINTIFFS,

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS.

Civil Action No. 83-3895

BRUCE CRONIN, ET AL., PLAINTIFFS,

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS.

AFFIDAVIT OF LAWRENCE S. EAGLEBURGER

I, Lawrence S. Eagleburger, depose and say as follows:

1. I am a Foreign Service Officer, with the rank of Career Minister. Since February, 1982, I have been the Under Secretary of State for Political Affairs of the Department of State. Organizationally, the Under Secretary of State for Political Affairs is the third ranking position within the Department of State, immediately following the Secreatary of State and the Deputy Secretary of State. I joined the Foreign Service in 1957 and have held a wide variety of positions, both in the Department of State and abroad. Prior to becoming Under Secretary of

State for Political Affairs I served as Ambassador to Yugoslavia and as Deputy Under Secretary for Management.

2. In my capacity as Under Secretary of State for Political Affairs, I participate in the formulation and conduct of this Nation's foreign policy. I have occasion to advise the Secretary and the Deputy Secretary concerning specific and general foreign policy issues. In this capacity I also have wide latitude in making independent judgments concerning matters that affect the foreign relations of the United States.

3. By virtue of my present position, I am thoroughly familiar with all relevant matters pertaining to the Department's policies regarding the issuance or refusal of nonimmigrant visas (hereinafter, "NIVs") in politically sensitive, that is, foreign relations sensitive, cases. Also, by virtue of my long and varied experience in a wide number of Department policy-making positions, I am familiar with the history of the Department's activities concerning such matters.

4. I have detailed personal knowledge concerning the recent denials of NIVs sought by or on behalf of Interior Minister Borge, former Senator Pasti, and Ms. Finlay and Ms. Lezcano. I also am familiar with the allegations made by plaintiffs in these suits. I offer the following testimony based upon my personal knowledge and information available to me in my official capacity.

5. The overwhelming majority of NIV applications involve only the ordinary circumstances of aliens seeking to visit the United States for reasons of business or pleasure. However, in some instances, the issuance, denial or revocation of a NIV to a particular alien can have significant diplomatic or foreign policy ramifications to the extent that the issuance or denial is construed as an act of the United States Government. Thus, for example, the issuance or denial of a visa to a foreign government official

may be taken by the alien's government as a reflection of United States foreign policy vis-a-vis that government and may result in reciprocal action or retaliation by that government. Similarly, the denial of visas to foreign government officials is one of the tools available to a government to communicate its attitude about the policies of other states.

6. Consular officers are authorized to seek advisory opinions from the Department in adjudicating individual NIV applications. For certain particularly sensitive categories of applications involving internal security or foreign policy considerations, the Department has directed that advisory opinions must be sought before taking action on the application in question. Thus, for example, consular officers must obtain advisory opinions in all cases before denying an application under sections 212(a)(27), (28)(F), or (29) of the Immigration and Nationality Act, or where the application is made by or on behalf of citizens of certain foreign countries such as Cuba, North Korea, and Vietnam.

7. When a consular officer seeks an advisory opinion on a particular NIV application, the nature of the review by the Department will depend upon the applicant and application in question, and the specific interests implicated by the proposed entry. It is clear and unequivocal policy of the Department that NIV applications should be granted unless, in the judgment of senior Department officers, there is reason to believe that approval of the requested entry would be likely to jeopardize significant United States foreign policy interests. Because of this fundamental policy and the fact that the circumstances and considerations pertinent to an alien's proposed travel necessarily may change over time, each application referred to the Department is considered individually and thoroughly before a determination is made.

8. The Department has for many years adhered to the principle that, in appropriate cases, visa applications by aliens may properly be denied for reasons of foreign policy. I have personal knowledge that, in both this and previous Administrations, the Department has construed its responsibility for foreign and diplomatic affairs and authority under the Immigration and Nationality Act as requiring that the Department and its consular officers give due and careful regard to the inextricable relationship between United States foreign policy and the response of our government to aliens seeking to enter the United States. Indeed, in my judgment, it would both ignore history and reality and severely prejudice the Department's ability to fulfill its responsibility to administer the interests of the United States within the international community to suggest that NIV determinations be made without regard to the potential foreign policy consequences thereof.

9. The denial of NIV applications for reasons of foreign policy is extremely rare. Contrary to plaintiffs' suggestion, such denials are not made on the simple basis that the applicant may be critical of United States policy. It is neither the policy nor the purpose of the Department to use visa denials to control or restrict dialogue and debate concerning the policies of the United States or any other member of the world community. I am aware of no instance in which a NIV request has been denied for reasons of foreign policy simply because the applicant was critical of our policies and objectives.

10. There are, however, occasions when, in the judgment of senior Executive officers, a particular NIV application must be denied for reasons of foreign policy. Such determinations are made on a case-by-case basis only after a thorough review of the information available to the Department and the recommendations of those officers responsible for the geographic and policy areas affected by the request under consideration. Such information and

recommendations often include data and analyses from the United States law enforcement and intelligence communities. Depending upon the sensitivitiy of the case, the ultimate determination may be made by either the Secretary of State or myself in the light of Administration foreign policy goals and objectives.

11. With respect to the NIV applications of Interior Minister Borge, former Senator Pasti, and Ms. Finlay and Ms. Lezcano, each case, upon request for advisory opinion by the consular officer concerned, was individually reviewed and considered by senior Department officers in light of current United States foreign policy. (While, as is normally done in such cases, routine name checks were made through United States intelligence agencies, contrary to plaintiffs' allegations, no recommendations were received from the Department of Justice or any of its components in these cases.) The information and deliberations involved in the determinations made on these four applications are highly sensitive, and the pertinent records have been classified in accordance with Executive Order 12356. I have prepared separate classified affidavits explaining the precise circumstances of each of the denial determinations, which, I understand, will be proferred to the Court for possible *in camera* consideration.

12. I personally made the determination made with respect to Interior Minister Borge. Mr. Borge was and remains a senior officer of the Nicaraguan Government. The visa application was submitted by the Nicaraguan Government on behalf of Mr. Borge through a diplomatic note to the American Embassy at Managua. The denial of the application was based upon my considered judgment that the entry of this particular alien for the purpose and during the period specified in the application would have been prejudicial to the conduct of the foreign affairs of the United States.

13. I have reviewed the determination made with respect to former Senator Pasti. In addition to his former positions as a senior officer in the public and military service of the Italian Government, Mr. Pasti was and remains a participant in certain activities of the World Peace Council (WPC), whose relationship to the Soviet Government is detailed in two unclassified Department of State memoranda (copies of which are attached hereto). The denial of Mr. Pasti's application was based upon the judgment of the Assistant Secretary of State for Consular Affairs, whose decision I ratified within twenty-four hours after it was made, that the entry of this particular alien for the purpose and during the period specified in the application would have been prejudicial to the conduct of the foreign affairs of the United States.

14. I have reviewed the determinations made with respect to Ms. Finlay and Ms. Lezcano. Ms. Finlay and Ms. Lezcano were and remain officers of the Federation of Cuban Women, an instrumentality of the Communist Party of Cuba. The visa applications of Ms. Finlay and Ms. Lezcano were submitted by the Cuban Government on their behalf by diplomatic note to the United States Interests Section at Havana. The official, governmental nature of their proposed trip was clearly manifested both by the issuance to the two women of Cuban diplomatic passports and by the submission of their applications through diplomatic channels. The denial of the applications was based on the judgment of the Assistant Secretary of State for Consular Affairs, which I ratified, that the entry of these particular aliens for the purpose and during the period specified in the applications would have been prejudicial to the conduct of the foreign affairs of the United States.

15. In each of these cases, NIVs were denied under 8 U.S.C. 1182(a)(27) for reasons of foreign policy. In my considered judgment, based on my long experience in

senior foreign policy positions within the Department of State, the power to deny aliens admission to the United States for foreign policy reasons, although rarely exercised, is an extremely important aspect of the Executive's ability to conduct the foreign relations of the United States. In this connection, I can certify, based on my personal knowledge, that this important power has never been exercised lightly or for the purpose of restricting access by United States citizens to the ideas and information offered by citizens of other countries.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 1984.

/s/ LAWRENCE S. EAGLEBURGER
Lawrence S. Eagleburger

UNITED STATES DEPARTMENT OF STATE
WASHINGTON, D.C.

Foreign Affairs Note

An informal research study for background information

April 1982

WORLD PEACE COUNCIL: INSTRUMENT OF SOVIET FOREIGN POLICY

The World Peace Council (WPC) was founded in 1949 as the World Committee of Partisans for Peace and first adopted its present title in 1950. It was based in Paris until 1951 when it was expelled for what the French Government termed "fifth column activities." It moved to Prague and then in 1954 to Vienna, where it remained until banned in 1957 by the Austrian Interior Minister for "activities directed against the Austrian state." However, it continued to operate in Vienna under the legal cover of the newly established International Institute for Peace until its move to its present location in Helsinki in 1968. The International Institute for Peace subsequently emerged as a separate Soviet front with strong links to the WPC.

In recent years, the WPC has expanded its activities while trying to broaden its appeal and sound less like a cold war propaganda vehicle. It has sought support in the Third World by posing as an independent body identifying with such causes as opposition to U.S. "aggression" in Vietnam, anticolonialism, and assistance to "liberation movements." In NATO countries, it has exploited fears of nuclear war by stimulating and/or sponsoring antinuclear rallies and advocating Soviet-supported disarmament policies.

The WPC and similar fronts periodically have faced internal problems because their Soviet affiliation cannot

always be reconciled with the desired image of independence and nonalignment. In 1949, following the expulsion of Yugoslavia from the Cominform, the WPC expelled its Yugoslav representatives. Similarly, the Sino-Soviet dispute led to the WPC's ostracism of China, which later became a major critic of all Soviet fronts. Nikita Khrushchev's revelations of Stalinist excesses at the 20th Soviet Communist Party Congress in February 1956 and the suppression of the Hungarian uprising by Soviet troops the following November cost the fronts considerable popular support. After the Soviet-led invasion of Czechoslovakia in August 1968, Moscow, in order to restore discipline, replaced nearly all major Communist-front officials. Although opposition to Soviet control occasionally occurs within the WPC, the leaders are usually able to confine dissent to private meetings of commissions or subcommissions. Dissenting views seldom find their way into the large-scale WPC-sponsored public gatherings. When, for example, Soviet human rights activist Andre Sakharov sent a message in 1976 to a WPC-sponsored forum on disarmament in York, Great Britain, it was not read to delegates as Sakharov had requested. At meetings in 1977, non-Communist participants embarrassed WPC leaders by asking questions about human rights violations in the U.S.S.R., but none of this found its way into the official reports. More recently, the December 1979 Soviet invasion of Afghanistan apparently once again generated dissension within the WPC. Two months elapsed before the WPC issued a statement endorsing the Afghan invasion.

MEMBERSHIP AND ORGANIZATION

The WPC has attracted the support of some prestigious non-Communist figures—literary, humanitarian, scientific, religious, and others—who are motivated by a genuine concern for peace and not dissuaded by the pre-

ponderance of Soviet and pro-Soviet personnel in key WPC leadership and decision-making positions. Total membership information has never been made public. Most of the members, moreover, do not belong to the WPC itself, but to affiliates at the national level. The WPC claims that 135 national "peace committees"—e.g., the U.S. Peace Committee, the Soviet Peace Committee, the Syrian Peace Committee—make up its network of local chapters.

Historically, it has been the function of the fronts to mobilize those elements of society not normally reached by local, Moscow-linked Communist parties—for example, sympathizers not wishing to commit themselves entirely to party discipline and those interested only in particular issues or moved by certain emotional appeals. Lenin saw the potential of international mass organizations as a means to marshal public support for party directives. In the 1930s during the "popular front" period, Willi Munzenberg, a veteran Communist organizer working for the Comintern, spoke cynically of international front organizations as "innocents' clubs."

The WPC is organized into four principal bodies.

—The Council, which meets every 3 years, is the organization's highest authority comprising representatives of cooperating international organizations and national peace committees.

—The Presidential Committee, elected by the Council, is nominally responsible for running the WPC between Council sessions. The Presidential Committee has 26 vice presidents (of which 11 are known to be members of pro-Soviet Communist parties) and 146 members. It holds regular annual and occasional emergency meetings. WPC President Romesh Chandra, a member of the Politburo of India's Moscow-line Communist party, chairs the Committee.

—A Bureau of the Presidential Committee, consisting of the WPC president, vice presidents, and representatives of selected national peace committees, implements decisions and plans future activities and "programs of action." It meets three to four times a year.

—The Secretariat, a full-time executive staff appointed by the Presidential Committee, is responsible for proposing new activities and for implementing Council, Presidential Committee, and Bureau decisions.

FUNDING

The WPC claims to be funded by contributions from national peace committees, donations to its World Peace Fund, and special collections. The evidence, however, strongly suggests that the bulk of its expenses are met by the Soviet Union. In addition, East Germany, Czechoslovakia, Bulgaria, Hungary, Poland, and Cuba provide material and financial support to the WPC, usually in the form of airline service and hotel expenses.[1]

According to the Soviet English-language weekly *Moscow News* (No. 19, 1981), the Soviet Peace Fund helps to finance "some" of the WPC's "large public initiatives."[2] Writing in *20th Century and Peace* (April 1980), Soviet Peace Fund Chairman Boris Polevoi asserted that his clients include "the leaders of the international democratic organizations working for peace: The Fund regularly gives

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[1] In a letter published in the *New Statesman* (October 17, 1980), a correspondent identified as Ruth Tosek, a "former senior interpreter for several of the Moscow-controlled organizations," stated that "all funds of these organizations, in local and in hard currency, are provided above all by the Soviet Union, but also by other East European satellite countries on the basis of set contribution rates, paid by the governments of these countries through various channels."

[2] The Soviet Peace Fund is a nationwide organization with the representatives scattered throughout most of the U.S.S.R.'s cities, towns, and villages. A common method by which money is collected

them assistance in organizing their undertakings." Polevoi also revealed that the Fund works closely with the Soviet Peace Committee, which aims "to render financial aid to the organizations, movements and personalities fighting for stronger peace, national independence and freedom." Referring to the October 1973 World Congress of Peace Forces in Moscow, an event organized jointly by the WPC and the Soviet Peace Committee, the November 1973 issue of the WPC's *Peace Courier* reported that "Soviet public organizations . . . covered all the delegates' maintenance expenses in Moscow. Soviet citizens donated to the Soviet Peace Fund—which covered the delegates' maintenance expenses—about $200,000. Moscow's Patriarchate also donated 3 million rubles."

At a February 9-19, 1981, session of the U.N. Committee of Non-Governmental Organizations, the WPC was forced to withdraw its application for upgrading its consultative status with the U.N. Economic and Social Council (ECOSOC) in the face of adverse criticism from ECOSOC members. WPC President Chandra said in response to questioning that the WPC's accounts were not independently audited but rather were reviewed by the WPC itself. In addition, he reported that the financial statements submitted to ECOSOC represented only a fraction of his organization's actual income and expenditure. Chandra made these statements while avoiding committee questions regarding the source of WPC financial contributions. According to the *ECOSOC Report* (March 16, 1981), ECOSOC members concluded that the WPC "had received large-scale financial support from government sources, and had gone to great lengths to conceal that fact from the committee."

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for the Soviet Peace Fund is for individual factories, plants, and collected farms to hold a 1-day "work shift for peace." According to the Soviet publication 20th Century and Peace (December 1981), the Krasnoyarsk Peace Committee received 2 million rubles in donations for the Soviet Peace Fund in 1981.

EXTENT OF SOVIET CONTROL

In June 1981, at a Kremlin ceremony, Soviet President Leonid Brezhnev presented Chandra, WPC president since 1977, with the Order of Lenin. Citing Chandra's service to the "ideals of peace, his selflessness in the bitter struggle against the forces of militarism and aggression," Brezhnev expressed gratification that the Soviet "peace program" for the 1980s met with "full understanding" from such an "authoritative movement as the movement of peace champions" (*20th Century and Peace*, August 1981). This act symbolizes the importance the Soviets attach to the WPC: The Order of Lenin is one of the most prestigious Soviet awards and is presented personally by Brezhnev only on rare occasions.

Control is exercised over the WPC by the Communist Party of the Soviet Union's (CPSU) Central Committee through its International Department (ID), which is headed by Central Committee Secretary and Politburo candidate member Boris Ponomarev. The ID maintains a special branch, known as the International Social Organizations Sector, which is responsible exclusively for front organizations. The special branch falls under the general responsibility of Vitaliy Shaposhnikov, a deputy ID chief who is at the same time a member of the WPC's Presidential Committee. Georgiy Zhukov, also a member of the WPC's Presidential Committee, is a candidate member of the CPSU Central Committee, a member of the U.S.S.R. Parliamentary Group, a deputy-chairman of the U.S.S.R.-U.S.A. Society, and the chairman of the Soviet Peace Committee—the U.S.S.R.'s national affiliate of the WPC. Through such direct lines to key WPC officials, the CPSU can often control decisions on WPC projects and activities as well as the content of statements, communiques, and resolutions stemming from WPC events.

Since its original "Stockholm Appeal" for "banning the bomb" in 1950, the WPC has consistently advanced Soviet positions on controversial international issues.

For example, in conjunction with other front organizations, it established the "Stockholm Conference on Vietnam," active from 1967-68 until the withdrawal of U.S. troops from Indochina in 1973. It supported the "International Commission of Inquiry into U.S. War Crimes in Vietnam," created in 1970 as a subsidiary of the Stockholm Conference. Throughout the Vietnam war, the WPC sent many "peace" delegations to North Vietnam and regularly issued statements supporting Soviet policy on the war. More recently, in March 1979, the WPC staged an "International Conference on Vietnam" to condemn the Chinese, and in May 1980 it organized a "special conference" in Hanoi to mark the 90th anniversary of the birth of Ho Chi Minh.

The anti-"neutron bomb" campaign initiated by the Soviets in mid-1977 provided the WPC and affiliated fronts with an opportunity to revive ban-the-bomb agitation and to claim that the United States was pursuing military policies which disregarded the interests of its European allies. The WPC proclaimed August 6-13, 1977, a Week of Action against the bomb and organized and helped orchestrate several peace and anti-bomb demonstrations in Europe, Africa, Latin America, and the Near East. President Carter's decision to postpone development of the neutron warhead was then touted as a victory for world "peace forces."

The December 1979 NATO decision to modernize its intermediate-range nuclear forces (INF) in response to the deployment of Soviet SS-20 missiles targeted on Europe now serves the WPC as the focus of a vigorously conducted campaign for "peace, disarmament and detente" designed to influence European public opinion against

NATO's plans. At the same time, the WPC avoids criticizing or even discussing Soviet and Warsaw Pact military deployments. Instead, during the past year, it has promoted Brezhnev's proposals for negotiations, organized "peace" rallies, and issued formal condemnations of NATO defense policies.

Some 200 representatives of 85 organizations from 30 European countries, the United States, and Canada, as well as from 13 international organizations, attended a WPC-organized "International Conference Against the Arms Race" in Stockholm, June 6-8, 1981. Discussions focused on the modernization of medium-range U.S. missiles in Europe, the "neutron bomb," and the consequences of nuclear war; Soviet SS-20 missiles were not mentioned. The conferees proposed sending a delegation to the United States to "report the mood of European public opinion" regarding U.S. nuclear policies; a conference communique also condemned NATO's INF plans.

WPC's Chandra and representatives of a number of other Soviet-controlled international fronts staged a September 12-13, 1981, "International Organizations Meeting" in Prague on "ways of averting nuclear war."

Some 60 participants, representing peace committees from 21 European countries, attended an October 2-4, 1981, "European Peace Committees Meeting" in Kosice, Czechoslovakia. Held under the slogan "For a Europe of Peace and Without Nuclear Arms," the meeting was organized by a WPC affiliate, the Czechoslovak Peace Committee, as a continuation of the June 1981 Stockholm Conference on Disarmament and Military Detente in Europe.

Chandra told a press conference in New Delhi on November 30, 1981, that the WPC was seeking a "winter offensive" in support of the "mass movement for disarmament" in Europe.

The current priority of Soviet diplomacy is to prevent INF modernization in Western Europe, and the WPC is expected to concentrate its efforts on this issue. Nevertheless, in line with its past record, the WPC will seek to operate however Soviet foreign policy interests dictate. As Romesh Chandra put it when speaking in Moscow in 1975: "The Soviet Union invariably supports the peace movement. The World Peace Council in its turn positively reacts to all Soviet initiatives in international affairs."[3]

[3] *New Times*, Moscow, July 1975.

UNITED STATES DEPARTMENT OF STATE
BUREAU OF PUBLIC AFFAIRS
WASHINGTON, D.C.

Special Report No. 101

July 1982

Soviet Active Measure: An Update

This report describes Soviet "active measures" which have come to light since the publication of Special Report No. 88, "Soviet Active Measures: Forgery, Disinformation, Political Operations," in October 1981

The Soviet Union uses the term "active measures" (*aktivnyye meropriyatiya*) to cover a broad range of activities designed to promote Soviet foreign policy goals, including undercutting opponents of the U.S.S.R. Active measures include disinformation, manipulating the media in foreign countries, the use of Communist parties and Communist front groups, and operations to expand Soviet political influence. In contrast to public diplomacy, which all nations practice, Soviet active measures often involve deception and are frequently implemented by clandestine means. Active measures are carried out not only by the KGB but also by the International Department and the International Information Department of the Central Committee of the Communist Party of the Soviet Union.

The active measures discussed in this report are necessarily limited to those that have been publicly exposed. They make clear that these activities take place worldwide. The open societies of many industrialized and developing countries afford the Soviets opportunities to use active measures to influence opinions in favor of

Soviet policies and against those of the United States and its allies. It is our hope that this report will increase public awareness and understanding of Soviet active measures and thereby reduce the likelihood that people will be deceived.

Forgeries

Forgeries are a frequently used active measures technique. Several have come to light in recent months. Their appearance has been timed to influence Western opinion on current sensitive issues. As far as we are aware, only one of these recent forgeries achieved uncritical publication.

Forgeries are usually sent through the mail to journalists, officials, or other persons who might make them available to the media. Forgeries normally do not carry a return address, nor is the sender identified in a way that can be checked. How the document was acquired invariably is vague.

The NATO Information Service Documents. In late October 1981, Spanish journalists living in Brussels received form letters purporting to come from the NATO Information Service. The letters enclosed a publicity packet that had been updated to include Spain as a new member of the alliance. As the Spanish Parliament was still debating Spain's application to join NATO, the letter could impress Spaniards as showing contempt for Spain's democratic institutions. The journalists checked with NATO, and stories in the Spanish press spoke of a forgery designed to influence Spain's domestic debate on NATO.

The President Reagan Letter to the King of Spain. In November 1981, an attempt was made in Madrid to surface a forged letter from President Reagan to the King of Spain. In terms likely to offend Spanish sensitivities, the

letter urged the King to join NATO and to crack down on groups such as the "OPUS DEI pacifists" and the "left-wing opposition."

After an initial mailing to Spanish journalists failed to obtain publication, the forgery was circulated on November 11 to all delegations (except the U.S. and Spanish) to the Conference of Security and Cooperation in Europe (CSCE), then meeting in Madrid. This time several Madrid newspapers ran stories that exposed the letter as a fabrication probably of Soviet origin.

The Clark-Stearns Letter. In January 1982, a forged letter and an accompanying research analysis dated September 23, 1981, from Judge William Clark, then Deputy Secretary of State to the U.S. Ambassador to Greece, Monteagle Stearns, circulated in Athens. This forgery indicated U.S. support for the conservatives in the October Greek elections and alluded to a possible military coup if Socialist leader Andreas Papandreou won at the polls. On the basis of Embassy assurances that the letter was a fake, it was not initially published. Several weeks later, after copies had been circulated at the CSCE in Madrid, the Athens daily *Vrathini* published a story describing the letter as of doubtful authenticity and probably attributable to a "third-country" intelligence service.

The Swedish Mailgrams. During the week of November 8, 1981, at least 10 mailgrams—initiated by telephone calls to Western Union—were circulated to journalists in the Washington, D.C. area. Supposedly sent by U.S. Government officials, the mailgram offered to make available the text of an alleged secret agreement for U.S. use of the Swedish base at Karlskrona for intelligence purposes.

The mailgrams were sent immediately after the furor caused by the grounding of a Soviet submarine in restricted waters off the Karlskrona naval base. Their timing

supports the conclusion that the effort was an attempt to offset the bad publicity the Soviets received from the incident.

The Haig-Luns Letter. The April 22, 1982 edition of the Belgian leftist weekly *De Nieuwe* published a letter supposedly sent in June 1979 by retiring NATO Commander Alexander Haig to NATO Secretary General Joseph Luns. Both NATO and U.S. officials branded the letter a fabrication.

The forged letter discussed a possible nuclear first strike and called for "action of a sensitive nature" to "jolt the faint hearted in Europe" opposed to intermediate-range nuclear force modernization. The timing of the false letter was related to the many antinuclear demonstrations which took place in Europe in the spring of 1982. The letter appeared again in the Luxembourg Communist Party newspaper, *Zeitung*, on May 10.

The Department of Commerce Document. In late May 1982, just before the Versailles economic summit, an alleged U.S. Government document dated February 19 1982 circulated in Brussels. Purporting to be the recommendations of a working group on strategic economic policy chaired by the Secretary of Commerce, the document twisted U.S. policy on sensitive trade issues in a way likely to stimulate friction between the United States and its European allies. Several journalists brought the matter to the attention of U.S. officials, who promptly branded it a forgery. As far as we are aware, the media have not reported the fabricated document.

Media Manipulation/Disinformation

The purpose of disinformation efforts is to gain public acceptance for something that is not true. Since Soviet media lack credibility, the goal is to achieve publication of false news in reputable non-Communist media. Soviet media, such as TASS or Radio Moscow, are then able to cite

credible sources in replaying a story in the hope that it will be picked up by other non-Communist media. Disinformation also is frequently placed in pro-Soviet news outlets outside the Eastern bloc in the hope that it will be replayed by independent media or simply gain acceptance through repetition.

Angola/Zaire/South Africa. One Soviet campaign has been to discredit U.S. policy in southern Africa—in particular, the credibility of U.S. efforts to solve the Namibia problem—by media stories that the United States is trying to oust the Government of Angola. A number of recent examples illustrate this effort.

- On September 15 and 23-24, 1981, the *Portugal Hoje* of Lisbon, a paper close to the Socialist Party, published reports that U.S., Zairian, and South African representatives had met secretly to conspire against the Angolan regime. The source for the story, an Angolan traveling to Lisbon, claimed he had stolen Zairian documents as proof, but he never made the documents available. Both Zaire and the United States denied the allegations. TASS promptly picked up the *Hoje* story, and in turn it was replayed in a number of African papers, including the *Jornal de Angola.*
- On December 22, 1981, *Diario de Lisboa*, a pro-Communist paper, reported that the United States was supporting "2,000 specially trained gunmen" based in Zaire to attack Angola. The State Department denied the story December 24, but TASS nonetheless picked it up. In turn, a number of African papers and radio stations and the Flemish Socialist daily *De Morgen* replayed the allegations on the basis of the TASS account.
- A similar story was carried in the April 17, 1982 Congolese newspaper *Etumba*, which alleged a meeting in 1981 between the United States, South Africa, and others to plot against Angola. The U.S. Embassy in Brazzaville promptly denied the report.

The Seychelles Coup Attempt. A day after the November 25, 1981 attempt by a group of mercenaries to overthrow the Government of the Seychelles, Soviet news reports were implying that the CIA was responsible. In keeping with frequent Soviet practice, these accusations were attributed to unnamed, and therefore unverifiable, "African radio commentaries." Despite a statement by Seychelles President France Albert René on December 2 that this government had no indication of any foreign involvement other than South African, Soviet media continued to accuse the United States. In December, several African newspapers (among them the *Nairobi Nation* and *Lagos Daily Times*, the leading dailies in Kenya and Nigeria, respectively) repeated the story. Soviet media then replayed the allegations, citing the African papers as sources.

The Pakistani Mosquitoes. In the wake of compelling evidence that the Soviets are using chemical weapons in Afghanistan and supplying mycotoxins for use in Laos and Kampuchea, Moscow has launched a disinformation effort focused on Pakistan. The February 2, 1982 *Literaturnaya Gazeta* alleged that the antimalaria program of the Pakistan Malaria Research Center in Lahore was a CIA-financed effort to breed special mosquitoes "which infect their victims with deadly viruses as part of U.S. plans to introduce biological warfare into Afghanistan." In fact, the Pakistan Malaria Research Center has been conducting antimalaria research for 20 years. Much of the funding comes from the U.S. National Institutes of Health and AID through a contract with the University of Maryland. The State Department promptly labeled the Soviet charges "utterly baseless."

The American Center Director Dr. David Nalin told the *Baltimore Sun* on February 9, 1982 that the allegations were a Soviet disinformation effort to counter U.S. "yellow rain" charges. Nonetheless, TASS continued to

carry the false stories, which were replayed not only by regular disinformation outlets, such as Bombay's *Blitz* and the New Delhi *Patriot*, but also by independent newspapers not usually associated with Soviet propaganda, such as the influential *Times of India* and Pakistani daily *Jang*, and the *Muslim News* of Capetown, South Africa.

A Moscow-funded Greek Newspaper? Another way to exert media influence is by secretly subsidizing a newspaper. This may have occurred recently in Greece. In May 1982, the Athens daily *Messimvrini* charged that a new large circulation daily, *To Ethnos*, had begun publication in September 1981 thanks to a secret Soviet subsidy of $1.8 million; *Messimvrini* alleged that covert payments were continuing. The Greek Government has ordered an investigation.

Military Base Hoaxes. A disinformation staple is to float false stores about U.S. military cooperation. Recent examples from Soviet and Communist media have included false stories that the United States has or intends to establish bases on the Honduran island of Amapala, the Colombian island of San Andres, and in the Comoros Islands off the east coast of Africa. Although these have not gained credence, one relating to Pakistan attracted more attention. As a result, the Pakistan Foreign Ministry on December 10, 1981 found it necessary to deny Radio Moscow's assertion that the United States would seek military bases in Pakistan during a visit by Secretary of State Haig. Among other things, the Radio Moscow account falsely asserted that Indian Foreign Minister Rao had claimed in the Indian Parliament that Pakistan had agreed to provide bases for the U.S. Rapid Deployment Force.

Front Groups/Pro-Moscow Communist Parties

Front groups are nominally independent organizations that are controlled by the Soviets, usually through the International Department of the Central Committee of the CPSU.[1] These organizations have long sought to build support for Soviet foreign policy goals. In recent months the main thrust of front activity has been to try to see that the peace movement in Western Europe and the United States is directed solely against U.S. policy and that it avoids any criticism of the Soviet nuclear threat. The 1982 program of the World Peace Council, for example, calls for:

- "Further intensification of actions against the dangers of nuclear war and the deployment of new U.S. weapons of mass destruction in Western Europe. . . ."
- "National events (demonstrations, seminars, colloquia, etc.) with international participation 'against nuclear arms build-up and the deployment of U.S. missiles in Europe; for peace and detente in Europe.' "
- "International meeting of mayors and elected representatives (city councillors, muncipalities, etc.) and of peace forces from European towns and regions where new U.S. nuclear missiles are to be deployed. . . ."[2]

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[1] See Foreign Affairs Note, *The World Peace Council, Instrument of Soviet Foreign Policy*. Department of State, April 1982. Other well-known international fronts are the International Institute for Peace (IIP). The World Federation of Trade Unions (WFTU), the World Federation of Democratic Youth (WFDY), the International Union of Students (IUS), the Women's International Democratic Federation (WIDF), the International Association of Democratic Lawyers (IADL), the World Federation of Scientific Workers (WFSW), the International Organization of Journalists (IOJ), the Christian Peace Conference (CPC), the International Federation of Resistance Fighters (FIR), and the Women's International League for Peace and Freedom (WILPF).

[2] *World Peace Council: Programme of Action 1982* published by the Information Center of the WPC, Helsinki.

Communist parties linked with Moscow have pursued the same path. The impact of the fronts and local Communist groups varies markedly from country to country and is difficult to evaluate. Nevertheless, awareness is increasing that the Communists and their supporters are attempting to channel the peace and antinuclear movements to serve Moscow's purpose. This has led to friction within the movement in some countries.

In West Germany, after efforts by the German Communist Party (DKP) in early April 1982 produced anti-U.S. slogans without mentioning the Soviet nuclear arsenal as a threat to peace, Petra Kelly, a prominent leader of the Environment Party (the "Greens") publicly criticized the Communists. She repeated this criticism when interviewed on CBS Television during President Reagan's visit to Bonn. Similarly, in Austria, the original platform adopted by the organizers of a peace march on May 15 under pressure from pro-Moscow Communists avoided criticism of Soviet atomic weapons. The non-Communists later regrouped; as a result, the Austrian Youth Council issued a less one-sided platform.

Political Influence Operations

Political influence operations, especially those using agents of influence, are harder to detect than other active measures. In these operations, individuals disguise their KGB connection while taking an active role in public affairs. Exposure, when it occurs, is frequently the result of an espionage investigation. The scale of improper Soviet activities is reflected in the publicized expulsion of 19 Soviet officials involved in espionage and active measures cases from 10 countries during the first 5 months of 1982. Among these were the expulsion of the Soviet military attache from Washington and the uncovering of spy nets in Indonesia and Singapore.

Denmark. In October 1981, the Danish Government expelled Vladimir Merkulov, a KGB officer serving as a second secretary of the Soviet Embassy, for improper conduct, including directing the activities of Danish agent-of-influence Arne Herloev Petersen. An April 17, 1982 Danish Ministry of Justice statement detailed Petersen's work with the KGB.

- In the summer of 1981, the Soviets arranged to cover Petersen's expenses for a series of advertisements in which Danish artists expressed support for a Nordic nuclear-weapons-free zone.
- Petersen brought foreign policy documents provided by the Soviet Embassy to the North Korean Embassy; on Soviet instructions he misrepresented the documents as coming from an American journalist.
- Petersen provided information several times to the Soviet Embassy on the Danish "left wing" and on "progressive" journalists who were not Communist Party members.
- Petersen arranged for the printing of a pamphlet attacking British Prime Minister Thatcher. The text was supplied by the Soviet Embassy.

The Ministry of Justice noted that clandestine meetings between Petersen and a succession of three Soviet "diplomats" (of whom Merkulov was the latest) had extended over several years. Petersen specifically was requested by his KGB handlers not to join the Danish Communist Party.

The Danish Government decided not to prosecute Petersen, although it declared that he violated Danish law. In a television interview 2 days after the official statement, the Danish Foreign Minister challenged Petersen to sue for slander so that the full extent of the government's evidence could be made public.

Sweden. Soviet Third Secretary Albert Liepa was expelled in April 1982. According to a Swedish Foreign Ministry spokesman, Liepa had made systematic efforts to collect information on and exert influence over the Latvian exile community in Sweden. Before his assignment to Stockholm, Liepa had been chairman of a committee based in Riga concerned with maintaining "cultural ties" with Latvians living outside the Soviet Union. ■

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3739

JAMES ABOUREZK, ET AL., PLAINTIFFS,

v.

RONALD WILSON REAGAN, ET AL., DEFENDANTS.

Civil Action No. 83-3741

CITY OF NEW YORK, ET AL., PLAINTIFFS,

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS.

Civil Action No. 83-3895

BRUCE CRONIN, ET AL., PLAINTIFFS,

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS.

AFFIDAVIT OF LOUIS P. GOELZ

I, Louis P. Goelz, depose and say as follows:

1. I am the Deputy Assistant Secretary of State for Visa Services within the Bureau of Consular Affairs of the Department of State. As such, I occupy the position formerly designated as Director of the Visa Office of the Bureau of Consular Affairs. I am a Foreign Service Officer with the rank of Minister Counsellor. I joined the Foreign Service in 1955. During my career, I have served at a variety of Foreign Service posts, including Lima, Hong Kong, Belem, Mexico City, Tehran, and Seoul. In

Tehran and Seoul I served as Consul General and Counsellor of Embassy for Consular Affairs. I have served in my present position since September 1981.

2. In my capacity as Deputy Assistant Secretary for Visa Services, I have day-to-day responsibility for the policy and administration of the issuance of immigrant and nonimmigrant visas by consular officers stationed throughout the world, as well as for the Department's response to queries and requests by such officers for information and advisory opinions necessary to their adjudication of applications by aliens for immigrant and nonimmigrant visas.

3. I have personal knowledge concerning the recent denials of nonimmigrant visas sought by or on behalf of Interior Minister Borge, former Senator Pasti, and Ms. Finlay and Ms. Lezcano. I also am familiar with the allegations made by plaintiffs in these suits. I offer the following testimony based upon my personal knowledge and information available to me in my official capacity.

4. Under the Immigration and Nationality Act of 1952, as amended, (hereinafter, the "Act") responsibility for regulating the entry of aliens into the United States is charged to the Secretary of State, the Attorney General, and consular officers of the United States. While consular officers are responsible for the issuance or refusal of visas, the Act reserves to the Attorney General authority to deny entry to a visaed alien, and to the Secretary of State authority to revoke visas, as well as general responsibility for administration and enforcement of the laws relating to the duties and functions of consular officers. The latter is particularly significant in light of the important role of consular officers in implementing and effecting United States policy throughout the world.

5. Within the Department of State (hereinafter, the Department), the Act establishes a Bureau of Consular Affairs (headed by an Assistant Secretary of State for

Consular Affairs), and a Visa Office (headed by a Director, the position I now hold as Deputy Assistant Secretary for Visa Services). By delegation of authority, the Assistant Secretary and Director act as the Secretary's agents in executing the latter's responsibilities under the Act and for the duties and functions of consular officers.

6. Under the Act, consular officers are authorized to issue or refuse immigrant and nonimmigrant visas sought by foreign nationals. Nonimmigrant visas (hereinafter, NIVs) are sought by aliens seeking to enter the United States for a temporary period for one or more of the purposes specified in section 101(a)(15) of the Act. Under section 221(a) and (g) of the Act, a consular officer may issue a NIV to an alien who has made a proper application, but is prohibited from doing so if the officer knows or has reason to believe that the alien-applicant is ineligible for the visa under the Act or any other provision of law. Section 212(a) of the Act establishes thirty-three separate categories of aliens to whom consular officer may not issue visas, and each alien-applicant must demonstrate to the consular officer his or her individual eligibility for the particular visa requested.

7. In accordance with the Act, the procedures governing consular officers' response to applications for NIVs are set forth in the Department regulations (appearing at 22 CFR Part 41) and internal guidelines (appearing in Volume 9 of the Department's Foreign Affairs Manual). Under these regulations and guidelines, an alien applying for a NIV must appear before the appropriate consular officer and submit to the officer a properly completed and executed application (Form OF-156), a valid passport, and such supporting documentation as the consular officer may deem appropriate. (The requirement for personal appearance before a consular officer may be waived by the consular officer, as a matter of discretion, in certain circumstances; e.g., where, as was the case with Borge,

Finlay, and Lezcano, the alien's visa application is submitted by diplomatic note from the foreign government.) The requirement for completion of the Form OF-156 may also be waived in certain more limited circumstances.

8. In determining whether to issue a NIV, the consular officer considers the information provided to him by the applicant and such information as may otherwise be available through the Department of State. For example, the officer routinely determines what information may be available concerning any previous visa applications the alien-applicant may have made. After careful consideration of such information, the consular officer may determine to (a) issue the visa, (b) seek further information from the applicant, (c) refuse the visa, or (d) seek an advisory opinion from the Department of State to obtain guidance as to the appropriate interpretation of law or application of the law to the particular facts and circumstances presented by the application under consideration.

9. By regulation, no visa application may be refused without further review by a senior officer at the consular office in question. Such reviewing officer may concur in the initial refusal, assume direct responsibility for the matter, or seek an advisory opinion from the Department. It is the clear and unequivocal policy of the Department that no proper NIV application shall be refused unless in the judgment of the consular officer upon the facts and circumstances known to him the alien is ineligible under applicable law to receive the visa. Each alien applying for a NIV may be given an opportunity to present additional information to "cure" any defects or deficiencies in his or her application. Moreover, there is not limit to the number of frequency of NIV applications an alien may submit to a consular officers, and each application and supporting documentation is given the same careful and conscientious consideration by the consular officer. The denial of a NIV

application is simply the judgment of the consular officer that on the available facts and circumstances the alien has failed to demonstrate eligibility for the particular visa requested, and in no way represents a permanent bar to the possible approval of a future application by the same alien.

10. Because of the sensitivity of certain categories of NIV applications, the Department has directed that consular officers seek advisory opinions in all such cases before making a decision. Such categories, identified both by categories of potential ineligibility under the Immigration and Nationality Act and (in limited cases) the nationality of the applicant, generally involve applications for which there are likely to be involved significant considerations concerning the security or foreign policy interests of the United States. For example, the Foreign Affairs Manual instructs consular officers to seek an advisory opinion in all cases where the officer has reason to believe that the applicant may be ineligible or previously may have been refused a visa under sections 212(a)(27), (28)(F), and (29) of the Act.

11. Section 212(a)(27) of the Act prohibits the issuance of a NIV to an alien who the consular officer "knows or has reason to believe seek[s] to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." Because the judgment on such sensitive and important matters necessarily involves considerations within the respective responsibilities of the Secretary of State and the Attorney General, as well as the need to ensure a uniform interpretation and application of the statutory provisions, under no circumstances may a visa be denied under section 212(a)(27) without careful consideration by

policy-level officers of the Department. At the Department's direction, all such cases must be referred to the Department for an advisory opinion.

12. For many years (indeed, to the best of my knowledge, since enactment of the Immigration and Nationality Act), the Department consistently has interpreted the language of section 212(a)(27) as applying to two distinct classes of cases: to aliens whose entry and proposed activity are deemed to pose a threat to the internal security of the United States, and to those aliens whose entry and proposed activity are deemed to threaten the security and foreign policy interests of the United States within the world community. I personally am aware that, in this and previous Administrations, NIV applications on occasion have been denied under section 212(a)(27) both for reasons of internal security and for reasons of foreign policy.

13. Whenever a consular officer seeks the Department's advisory opinion concerning possible ineligibility under section 212(a)(27), the case first is reviewed by the operational staff of the Visa Office. If the case appears to involve internal security considerations, appropriate coordination is made with United States law enforcement agencies. If, on the other hand, the case appears to involve foreign policy considerations, a special Departmental review procedure is initiated. In either instance, it is likely that liaison and coordination will be made with appropriate United States intelligence agencies. Because of the importance and sensitivity of such matters, much of the deliberations and records pertaining to section 212(a)(27) matters is classified in accordance with Executive Order 12356.

14. All potential section 212(a)(27) cases referred to the Department are given thorough, individual consideration by the staff and officers responsible for the particular interests of the United States implicated by the request in question. No visa denial for reasons of foreign policy is

authorized without case-specific review and approval by senior officers responsible for formulating and administering the Nation's foreign policy. In all such cases, denials may be authorized only by the Assistant Secretary of State for Consular Affairs or a superior officer. In appropriate cases the determination may be made by the Secretary himself or his immediate designee (such as Under Secretary Eagleburger). The determination is then communicated to the consular officer requesting the advisory opinion.

15. Because of the Department's very strict internal review procedures, the number of visa applications denied under section 212(a)(27)—either for reasons of internal security or for reasons of foreign policy—is extremely small. During the twenty-year period the Department has maintained such statistics, only 519 NIV applications have been denied under section 212(a)(27), while consular officers during the same period have issued almost 70 million NIVs. Indeed, for each of the last three years there have been on average less than thirty NIV applications denied under section 212(a)(27), as against the annual issuance of 6 to 7 million nonimmigrant visas. (It should be noted, moreover, that, because NIV determinations are made on an application-by-application basis on the facts available and deemed pertinent at the time of the application, and because any alien, regardless of nationality and circumstances, may apply for a NIV at any time, such variations as do exist in the annual statistics cannot accurately be said to reflect changes in Department policy.) Contrary to plaintiffs' allegations, I am aware of *no* case in which section 212(a)(27) was invoked simply because the applicant was critical of American policy.

16. I have reviewed the circumstances and records pertinent to each of the recent denials of NIV applications made by or on behalf of Interior Minister Borge, former Senator Pasti, and Ms. Finlay and Ms. Lezcano. Each

such application was carefully and thoroughly reviewed within the Department in the manner explained above. As explained by Under Secretary Eagleburger, each application was denied upon determination by senior Department officers that approval of the particular application in question would be prejudicial to the conduct of the foreign affairs of the United States.

17. Tomas Borge Martinez, born August 13, 1930, at Matagalpa, Nicaragua, is Minister of the Interior of Nicaragua and a member of the National Directorate of the Frente Sandinista de Liberacion Nacional (FSLN, the Sandinista Front for National Liberation). On November 21, 1983, the consular officer at Managua, Nicaragua, reported that, by diplomatic note from the Nicaraguan Government, Borge had applied for a visa for the purpose of travelling to the United States for five days, desired to travel as soon as possible, and intended to visit Washington, New York, Boston, and Chicago, and that the responsible consular officer sought the Department's advisory opinion concerning Borge's eligibility to receive a visa for the purpose stated. On November 29, 1983, the Department informed the consular officer at Managua that it was of the opinion that Borge was ineligible to receive a visa under section 212(a)(27) of the Act on the ground that his proposed entry and activities in the United States would conflict with United States foreign policy interests and would be prejudicial to the public interest. On or about November 29, 1983, both the American Ambassador and the responsible consular officer in Managua informed the government of Nicaragua that Borge's visa application was denied pursuant to section 212(a)(27) of the Act. Borge's passport was thereupon returned to the government of Nicaragua.

18. Nino Pasti was born April 18, 1909, at Bologna, Italy. In addition to being a retired Italian Army General and former member of the Italian Senate, he is also an

active participant in the activities of the World Peace Council (WPC), an instrumentality of the Soviet Government. On September 28, 1983, he applied at the Embassy at Rome, Italy, for a nonimmigrant visitor visa. He stated that he has been invited to participate in a speaking tour around the United States between October 18 and 25, 1983. The consular officer who considered Pasti's application found that Pasti was ineligible to receive a visa under section 212(a)(28), INA, 8 U.S.C. 1182(a)(28), on the ground that his election to the Italian Senate in 1975 and 1979 as a member of the list of candidates of the Communist Party of Italy (PCI) constituted an affiliation with a communist party within the meaning of that section of law. On October 3, 1983, the consular officer at Rome reported to the Department by telegram the facts recited above, sought the Department's advisory opinion on Mr. Pasti's ineligibility and asked the Department to consider whether a waiver of Pasti's ineligibility should be recommended to permit his temporary entry notwithstanding his ineligibility. After careful consideration of the information reported by the consular officer at Rome, together with other information relating to Pasti, in light of existing policy guidelines, the Department informed the Embassy on or about October 17, 1983, that, in its opinion, Pasti was ineligible to receive a visa under section 212(a)(27) INA, 8 U.S.C. 1182(a)(27) on the ground that his proposed activities would be prejudicial to the public interest for foreign policy reasons. On or about October 18, 1983, Pasti was informed that his application was denied on that basis. His passport was returned to him.

19(a). Olga Finlay Saavedra, born September 13, 1939, at Havana, Cuba, is a lawyer and a member of the National Committee of the Federation of Cuban Women. She is also an official of the Cuban Communist Party and is the Cuban Representative to the U.N. Commission on the Status of Women. Maria Leonor Rodriguez Lezcano,

born February 22, 1947, at Havana, Cuba, is an official of the Federation of Cuban Women. The Federation of Cuban Women is a mass organization affiliated with and controlled by the Communist Party of Cuba.

(b) On September 22, 1983, the consular officer at the U.S. Interests Section (USINT) at Havana reported that both women had applied for nonimmigrant visitor for business visas (visa symbol B-1). (Use of the term "Interests Section", instead of "Embassy," "Consulate General," or "Consulate," reflects the fact that the United States and Cuba do not maintain full diplomatic relations.) The consular officer also reported that the visa applications were conveyed to USINT by diplomatic note from the Government of Cuba on September 21, 1983, and that both women were the bearers of Cuban diplomatic passports.

(c) Both women intended to enter the United States on or about October 16, 1983, for a period of thirty days to participate in "The Third World Women's Project sponsored by the Institute for Policy Studies." This participation was stated to include speeches on women's issues to church and university groups.

(d) After careful consideration of the information reported by USINT, Havana, in light of existing policy guidelines, the Department informed the consular officer that, in its opinion, the two women were ineligible to receive visas under section 212(a)(27) on the ground that their proposed activities would be prejudicial to the public interest for foreign policy reasons. USINT, Havana, informed the government of Cuba by diplomatic note on October 8, 1983 that the visa applications had been denied under section 212(a)(27). The passports of the two women were then returned to the government of Cuba.

20. As explained above, all determinations on NIV applications—whether or not such determinations involve an advisory opinion by the Department—are made on an

application-by-application basis. Both Finlay and Pasti have previously received NIVs and travelled to the United States. Both have submitted NIV applications which were approved but failed to travel. Finlay applied for and received an NIV and travelled to the United States in December 1983, after the denial complained of. The purpose of her trip on that occasion was, however, altogether different and was not in conflict with United States foreign policy interests. An application earlier in 1983 in behalf of Interior Minister Borge was approved but he apparently elected not to travel to the United States at that time. The Department has no record that Lezcano had previously applied for an NIV. Each of the four aliens remains free to submit a further NIV application; however, to the best of my knowledge, no visa application by any of the four aliens is currently pending adjudication.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 1984.

/s/ LOUIS P. GOELZ

Louis P. Goelz

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3739

JAMES ABOUREZK, ET AL., PLAINTIFFS,

v.

RONALD WILSON REAGAN, ET AL., DEFENDANTS.

Civil Action No. 83-3741

CITY OF NEW YORK, ET AL., PLAINTIFFS,

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS.

Civil Action No. 83-3895

BRUCE CRONIN, ET AL., PLAINTIFFS,

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS.

DECLARATION OF TOMAS BORGE

I, Tomas Borge, declare as follows:

1. I am a citizen of Nicaragua, and the Interior Minister of that nation.

2. I have never travelled to the United States.

3. In 1982, I was invited to the United States to speak by a number of universities (including Johns Hopkins and Harvard) on my country's political, economic, and social affairs, the state of our relations with the United States, and political events in Central American [sic] generally. I very much wanted to accept those invitations, and applied for the visa, but my application was denied.

4. In August 1983, I received a request from Ambassador Quainton, United States ambassador to Nicaragua, to speak with him. He informed me that the United States had decided to give me a visa at any time I desired one. I was eager to travel to the United States, to meet with those who had previously invited me, although prior plans first took me to Europe to meet with leaders of various nations. On my return to Nicaragua, I recontacted the 14 universities which had invited me, and numerous individuals who had sought to discuss the situation in Central America, including some of the plaintiffs. Based on the prospect of numerous speeches and meetings in the United States with members of Congress, opinion leaders, and important groups, I sent my passport to the United States embassy.

5. One day before I was to leave for the United States, after we had spent substantial sums on planning our itinerary, travel arrangements, and security arrangements, I was advised that the United States government had denied the visa request.

6. The purpose of my trip was solely to engage in the above-mentioned discussions and public speaking concerning the prospects for peace in Central America. I had no intention of engaging in any activities during my trip which would have been prejudicial to the United States public interest, dangerous to the welfare, safety, or security of the United States, or violative of any United States laws.

7. I am interested in fulfilling the speaking engagements and meetings which, but for the denial of my visa, I would have undertaken, and plan—subject to getting a visa—to fulfill them.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ TOMAS BORGE
Tomas Borge

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DECLARATION OF OLGA FINLAY

1. I am a citizen of Cuba, and an attorney.

2. I am a member of the Federation of Cuban Women ("FMC"), and since 1980 have represented the FMC at meetings of international organizations.

3. I am the author of "Cuban Women 1975-1979," "The Rights of Children in Cuba" in *Children of Cuba: Twenty Years,* and a monograph on the legal rights of children in Cuba. I collaborated with C. Wright Mills on his book concerning the Cuban Revolution, *Listen Yankee.*

4. In 1979, I served as Secretary of the Cuban Committee established as part of UNICEF's International Year of the Child. In 1980, 1982, and 1984, I was the Cuban representative to the United Nations Commission on the Status of Women.

5. I lived in the United States from the age of 11, in 1951, to 1961. I attended school in New York City first at Blessed Sacrament, and have travelled to the United States many times subsequently. I have never been arrested in the United States, or elsewhere, and have never violated the terms of a United States visa.

6. I was invited to travel privately to the United States in the fall of 1983 to speak on women's issues by the New York City Commission on the Status of Women and by a number of church and university groups. The trip to the United States which I planned on taking to fulfill these invitations, which I had accepted, involved solely discussions and speeches concerning women's issues and the role of women and children in Cuba today. (I was not travelling to the United States to engage in any activities that could be considered prejudicial to the public interest of the United States or that could endanger its welfare, safety, or to violate any United States law.) In my experience, the give-and-take of face-to-face discussion and argument can be more effective than the mere passive reading of written materials, or even telephonic conversation, can be. Accordingly, I have attended numerous international meetings, conferences, and the like. The United States is the only nation which has ever precluded my entry.

7. I was not travelling as a member of the Cuban government or as a member of the FMC, or on official Cuban government business. To the contrary, I was undertaking this trip solely in a private capacity, although the Cuban government had facilitated the trip by conveying my visa application to the United States interests section. My visa application was not submitted with a

diplomatic passport, but rather with an official passport. This passport is not diplomatic, and is used by many non-diplomats, such as artists, etc. The letter transmitting my visa application, reciting that Leonor Lezcano and I were invited by the Third World Women's Project (of the Institute for Policy Studies) and that our requested thirty-day trip was for the purpose of travelling to speak with university and church groups on women's issues, is attached hereto.

8. The FMC is not an instrumentality of the Cuban government or the Cuban Communist Party. It is not controlled by that Party. Indeed, many of FMC members—including myself—are not members of the Party. The FMC is a non-governmental voluntary organization of over 2,000,000 members, supported solely by their direct contributions of 25 cents a month, which works for the equality of women in employment and other fields.

9. I was personally informed in early October, 1983—*not* through the Cuban government—that my visa was denied.

10. I was given a limited visa in December, 1983, to enable me to attend a meeting of the Pan American Health Organization, a United Nations related body, which was meeting in Washington. Based on instructions I had received, however, I believed that I could engage in no other activity while in the United States other than attendance at that meeting.

11. Because of those instructions, I limited my activities accordingly. For example, although I was invited to speak one evening to individuals associated with the Institute for Policy Studies, I declined, believing, and having been so advised by an American immigration attorney, Michael Maggio, Esq., that the limitations on my visa precluded any such contact.

12. I am interested in fulfilling the speaking engagements and meetings which, but for the denial of my visa, I would have undertaken, and plan—subject to getting a visa—to fulfill them.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 19, 1984.

/s/ OLGA FINLAY

Olga Finlay

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3739

JAMES ABOUREZK, ET AL., PLAINTIFFS,

v.

RONALD WILSON REAGAN, ET AL., DEFENDANTS.

Civil Action No. 83-3741

CITY OF NEW YORK, ET AL., PLAINTIFFS,

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS.

Civil Action No. 83-3895

BRUCE CRONIN, ET AL., PLAINTIFFS,

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS.

DECLARATION OF LEONOR RODRIQUEZ LEZCANO

1. I am a citizen of Cuba.

2. I am a member of the Federation of Cuban Women ("FMC") and serve in the office of the Secretary of Foreign Relations of that organization.

3. I am a 1974 graduate of the University of Havana, and have done research on life in isolated rural Cuban villages.

4. I was invited to speak in the United States to the New York City Commission on the Status of Women, and to various chuch and university groups, in the fall of 1983,

on "Black Women in Cuba," a subject with which I am extremely knowledgeable.

5. I have been to the United States on one prior occasion.

6. In 1979 I travelled to New York City to attempt [sic] a meeting at the United Nations. My application for a visa in the fall of 1983 was denied by the United States government. Contingent on securing such a visa, I intend to fulfill the speaking engagements to the plaintiffs in this action which I have been precluded from keeping.

7. My trip to the United States was to have been undertaken in a private capacity. I was not invited as, and would not have spoken as, a member of the Cuban government, an official of the FMC, or on official Cuban government business. Indeed, I am in no sense an official of that organization. My visa application was not submitted with a diplomatic passport, but rather with an official passport. This passport is not diplomatic, and is used by many non-diplomats, such as artists, etc. The letter transmitting my visa application, reciting that Olga Finlay and I were invited by the Third World Women's Project (of the Institute for Policy Studies) and that our requested thirty-day trip was for the purpose of travelling to speak with university and church groups on women's issues, is attached to the Declaration of Olga Finlay.

8. The FMC is not an instrumentality of the Cuban government or the Cuban Communist Party. It is not controlled by that Party. Indeed, many of FMC members—including myself—are not members of the Party. The FMC is a non-governmental voluntary organization of over 2,000,000 members, supported solely by their direct contributions of 25 cents a month, which works for the equality of women in employment and other fields.

9. The trip which I have been precluded from taking would not have involved any activities which could be considered prejudicial to the public interest of the United

States or that could endanger its welfare, safety, or security, or which would have violated any United States law. To the contrary, the only purpose of the trip was to engage in private and public face-to-face discussion concerning the role and position of Black women in Cuban society, and generally on social, economic, and legal issues of mutual concern to women both in Cuba and the United States.

10. I am interested in fulfilling the speaking engagements and meetings which, but for the denial of my visa, I would have undertaken, and plan—subject to getting a visa—to fulfill them.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Executed on April ____, 1984.

/s/ LEONOR RODRIQUEZ LEZCANO
Leonor Rodriquez Lezcano

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3739

JAMES ABOUREZK, ET AL., PLAINTIFFS,

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GEORGE P. SHULTZ, ET AL., DEFENDANTS.

DECLARATION OF NINO PASTI

I, Nino Pasti, declare as follows:

1. I am a citizen of Italy, presently working as a journalist. I edit the monthly magazine "Lotta per la Pace e il Disarmo" (Struggle for Peace and Disarmanent) and am President of the related organization, "Lotte per la Pace."

2. Most of my career was spent in the Italian Air Force, in which I reached the highest rank, four star General of the Air Force. In that capacity, I served as the Italian Military Representative to the NATO Military Committee, 1963-66, and as Vice-Supreme Allied Com-

mander in Europe for Nuclear Affairs, 1966-68. I retired in April, 1969, having reached 60, the age of mandatory retirement.

3. While I served as the Italian representative to the NATO Military Committee, I was stationed in and worked in the Pentagon in Washington, D.C. My responsibilities included work on the entire range of NATO military issues; I was essentially the "foreign military minister" of the Italian General Staff to the Military Committee and I worked often in contact with the United States Department of Defense.

4. During that three-year stay in the United States, and during subsequent visits to the United States in 1979 and 1981, I was never arrested and never broke any laws. Indeed, I have never been arrested in Italy or any other place in the world.

5. In 1976, I was elected as a Senator to the Italian legislature as a left independent, a list supported by but entirely separate from the Italian Communist Party. I was reelected in 1979 on the same list. I am not, and never have been, a member of the Communist Party, or indeed of *any* political party. I ran during the 1983 election on a local list, and was not elected.

6. Attached hereto and incorporated herein are five copies of previous visas issued by the United States government. The visa dated 13 November 1979 was for the purpose of a "UN Meeting and Tourism," although in the event I did not make that trip. The visa dated 12 April 1981 was to attend a S.A.N.E. (anti-nuclear weapons) meeting in Washington, D.C. A third visa was issued on 26 May 1982, but was quickly cancelled and replaced with a visa dated 8 June 1982, which imposed severe and, in my case, unprecedented restrictions on my travel to the United States, a copy of which is also attached hereto and incorporated herein. Because of those restrictions, I refused to travel to the United States at that time.

7. I was invited to the United States during the summer of 1983, initially by Mr. Pat Tobin, Vice President of the International Longshoremen's and Warehousemen's Union Local No. 10, in San Francisco, and by Mr. Michael Meyerson, Executive Director of the United States Peace Council, in New York, and shortly thereafter by a number of other groups, including the New England Campaign to Stop the Euromissiles, which (with associated groups, including the Boston Mobilization for Survival) invited me to speak in Boston on October 23, 1983.

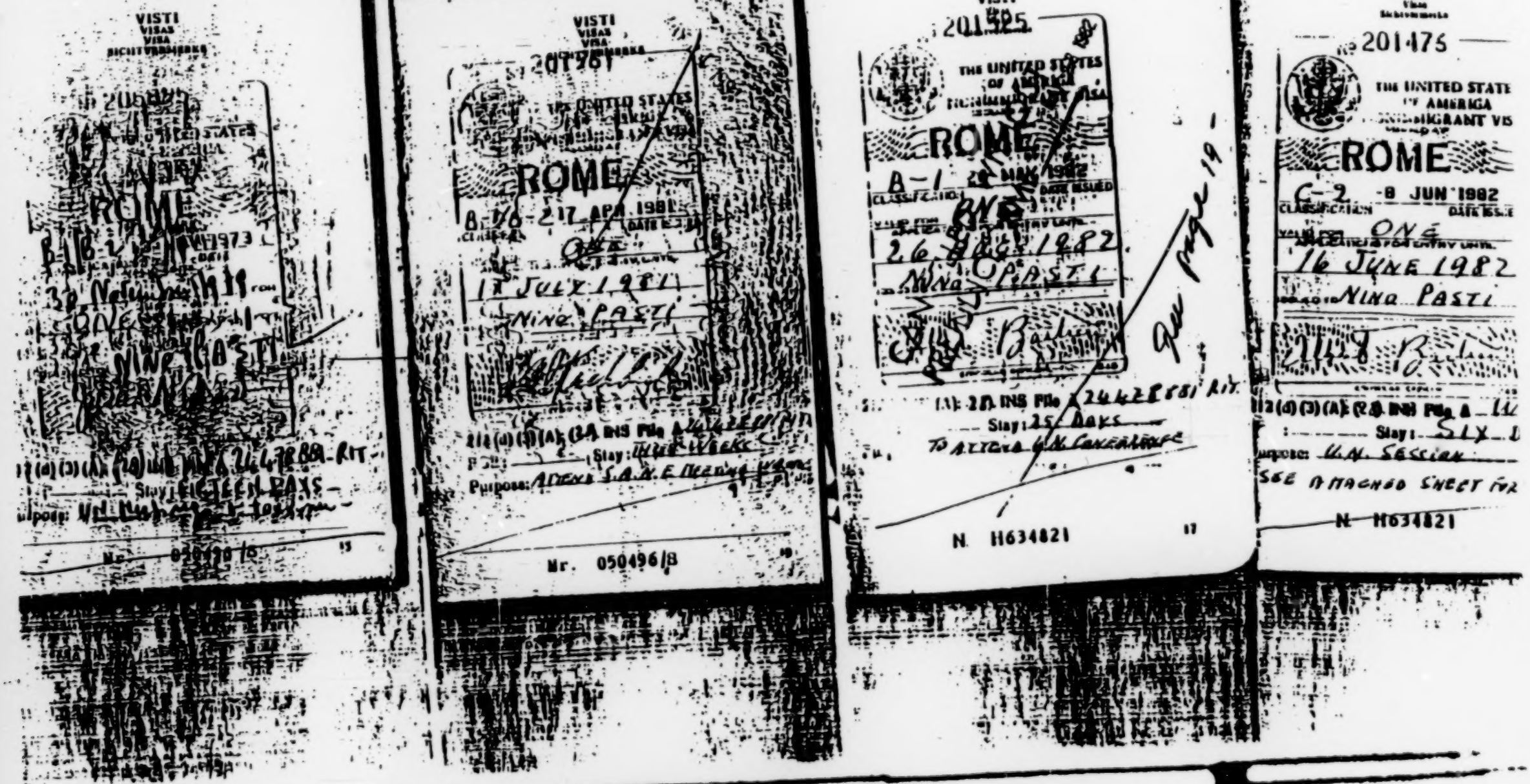
8. I applied for a visa on or about 8 September 1983, for the stated purpose of undertaking a public speaking engagement and went to the American Consulate in Rome then and on two other occasions to answer questions concerning my proposed visit. I was asked whether I was a member of the Communist Party and truthfully responded that I was not. I was asked numerous questions concerning my political activities. The visa was denied shortly thereafter.

9. Based on my professional military and political experience, I have become extremely active in opposing various aspects of NATO military policy which, in my view, are destabilizing and a grave threat to peace and human survival. Because my experience renders me particularly knowledgeable about these matters, I believe that I have a duty to speak to lay audiences who are seeking to understand better the extremely serious issues that the present arms race poses. In that spirit, I accepted the invitation from the plaintiffs in this action to speak to them personally in Boston, and to the rallies they sought to organize. Contingent on securing a visa to do so, I plan to fulfill those Boston invitations, and I have also agreed to come to the United States at the invitation of plaintiff Mobilization for Survival to speak at a series of events.

10. I was not travelling to the United States to engage in any activities that could be considered prejudicial to the public interest of the United States or that could endanger its welfare, safety, or security, or to violate any United States law. To the contrary, my intention was merely to meet face-to-face with plaintiffs and others, to engage in public and private discussions concerning Euromissiles and the arms race generally. In my experience, the give-and-take of discussion and argument can be much more effective than the more passive reading of a written speech, or a letter, or even of a film or videotape, can possibly be. Accordingly, for some years I have been attending numerous international meetings on Euromissiles and nuclear weapons policies; the United States is the only nation which has presumed to exclude me from such meetings or discussions.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Executed on April ____, 1984.

/s/ NINO PĀSTI
Nino Pasti



BEST AVAILABLE COPY

EMBASSY OF THE
UNITED STATES OF AMERICA
ROME, ITALY

JUNE 8, 1982

NINO PASTI

CONSULAR OFFICER STATEMENT

(A) Visa is issued solely for purpose of attendance at United Nations meeting:
(B) Travel restricted to headquarters district (area within 25 mile radius of Columbus Circle, NYC):
(C) No deviation or extension of stay without prior approval U.S. Immigration Service (COAJ):
(D) Violation of the terms of the visa will make you liable to deportation or other sanctions.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3739

JAMES ABOUREZK, ET AL., PLAINTIFFS,

v.

RONALD WILSON REAGAN, ET AL., DEFENDANTS.

Civil Action No. 83-3741

CITY OF NEW YORK, ET AL., PLAINTIFFS,

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS.

Civil Action No. 83-3895

BRUCE CRONIN, ET AL., PLAINTIFFS,

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS.

SECOND AFFIDAVIT OF LOUIS P. GOELZ

I, Louis P. Goelz, depose and say as follows:

1. I am the Deputy Assistant Secretary of State for Visa Services within the Bureau of Consular Affairs of the Department of State. As such, I occupy the position formerly designated as Director of the Visa Office of the Bureau of Consular Affairs.

2. I have previously given testimony in the above-captioned cases in an affidavit executed February 28, 1984. I am familiar with the testimony of Under Secretary Eagleburger and former Legal Adviser Meeker concerning the denial of nonimmigrant visas under section 212(a)(27)

of the INA for reasons of foreign policy. I offer the following in supplementation of my previous affidavit.

3. In my capacity as Deputy Assistant Secretary for Visa Services I have custody of, and access to, the files of the Visa Office. While visa records are required to be treated as confidential by the terms of section 222(f) of the Immigration and Nationality Act and many documents in visa records are classified under the applicable Executive Order, there are cases in which, because of Congressional inquiry or other public interest, the basic facts of a visa refusal become a matter of public record. Three such cases illustrate the Department's practice over the years, as I have understood it and as described in my affidavit of February 28, 1984.

4. In late 1958, Thomas W. I. Liao, a native of Formosa and a strong supporter of an independent Formosa, independent both of Chiang Kai-Shek and Mao Tse Tung, applied for a visa to visit the United States. In early 1959, his application was refused under section 212(a)(27) of the INA for foreign policy reasons. In a letter of December 10, 1959, to then Senate Foreign Relations Committee Chairman J. W. Fulbright the Department stated:

> As you know, the Republic of China on Taiwan constitutes a vital link in our system of collective security arrangements in the Far East, which in turn forms our first line of defense against Communist aggression in that region. Our relations with the Republic of China are therefore a matter of great national importance to the United States. Thomas W. I. Liao by his own admission is the self-appointed leader of a revolutionary Formosan "government" which seeks to overthrow the Republic of China. The Department has reason to believe that his primary motivation in wishing to enter the United States is to advance this end. Therefore, there is a clear incompatibility between Mr. Liao's projected activities while in the United States and our

foreign policy objectives with respect to Taiwan and the Republic of China. Accordingly we have concluded that under the provisions of Section 212(a)(27) of the Immigration and Nationality Act he is ineligible for a visa.

5. In 1961 and 1962, Mr. Liao again applied for nonimmigrant visas to visit the United States. On both occasions his applications were refused under section 212(a)(27) for the same reasons. On February 5, 1962, the Department informed Senator Leverett Saltonstall of the refusal of Mr. Liao's application under section 212(a)(27).

6. In April 1959, Otto Skorzeny, a former Nazi SS Officer, applied for a visa to visit the United States. His application was refused under section 212(a)(27) of the INA for foreign policy reasons, and, in response to an inquiry, the Department reported the refusal to Congressman Alexander Pirnie by a letter dated June 25, 1959.

7. On June 11, 1964, Mme. Ngo Dinh Nhu, sister-in-law of the deceased Prime Minister of Vietnam, Ngo Dinh Diem, applied for a visa to visit the United States to make several public appearances. On July 3, 1964, the Administrator of the Bureau of Security and Consular Affairs (predecessor of the Assistant Secretary of State for Consular Affairs) informed Mme. Nhu's representative in the United States of the refusal of her application in a letter explaining,

> I am the official within the Executive Branch of the Government responsible for deciding, in an advisory opinion, to deny Madame Nhu's application for a six month visitor visa; and for so advising our Consul in Paris. Therefore I am responding to your telegrams of June 27 and July 2 addressed to the Secretary concerning this case.
>
> For your information, I cite the statement issued by our Embassy in Paris on June 23rd: "Madame Nhu applied for a six-month visitor visa at our Embassy. The consular officer, in accordance with established

procedure, requested an advisiory opinion from the Department of State as to Madame Nhu's eligibility for a visa. In response to the request, the Department of State has advised the consular officer that it considers Madame Nhu ineligible to receive a visa under Section 212(a)(27) of the Immigration and Nationality Act. This section makes ineligible for a visa and inadmissible into the United States 'aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the U.S. solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety or security of the United States.' Madame Nhu has been notified that her application for a visa has been refused."

The consul in Paris and I took into account all pertinent factors—including President Kennedy's press statement of November 14, 1963—before the consul made his determination. Obviously, the most important factor is our commitment to the Government of the Republic of Vietnam which, as you know, we are strongly supporting in its struggle against Communist guerillas. The Vietnamese Government informed us that, because of the repeated denunciations by Madame Nhu of the Government of the Republic of Vietnam, her admission to and her expected activities in the United States would not be understood in Vietnam. Our Embassy in Saigon strongly urged against issuance of a visa because her expected activities would only serve as a demoralizing influence on the people and Government of Vietnam.

In view of all these factors it was determined that issuance of a visa to Madame Nhu would be prejudicial to U.S. interest as cited in the law above.

8. Although there is no record that the Department had corresponded with the Congress on Mme. Nhu's case, its awareness of the visa denial for reasons of foreign policy is documented by the remarks of Senator Thomas Dodd reported at 110 Cong. Rec. 15273 (July 2, 1964).

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 1, 1984.

/s/ LOUIS P. GOELZ
Louis P. Goelz

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES ABOUREZK, 21 DuPont Circle, NW, Suite 400, Washington, D.C. 20036, (202) 775-5960;	)
DOUGLASS CASSEL, JR., 109 North Dearborn, Chicago, Illinois 60602, (312) 641-5570;	)
JOHN COATSWORTH, Department of History, University of Chicago, 1126 E. 59th Street, Chicago, Illinois 60637, (312) 963-8379;	)
REVEREND HARVEY COX, Harvard University, Cambridge, Massachusett 02138, (617) 495-5752;	)
DON EDWARDS, individually and in his capacity as a member of the United States House of Representatives, Washington, D.C. 20515, (202) 225-3072;	)
SIDNEY LENS, 990 Lake Shore Drive, Chicago, Illinois 60611, (312) 787-3916;	)

) FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF Civil Action No.

GEORGE OVERTON, 5648 South Dorchester,
Chicago, Illinois 60637,
(312) 363-8266;

RICHARD PARKER, 777 U.N. Plaza,
New York, New York 10017,
(212) 682-0889;

CHARLES E. SCHUMER, individually and in his capacity as a member of the United States House of Representatives, Washington, D.C., 20515, (202) 225-6616;

JAMES M. SHANNON, individually and in his capacity as a member of the United States House of Representatives, Washington, D.C. 20515, (202 225-3411;

PAUL TSONGAS, individually and in his capacity as a Member of the United States Senate, Washington, D.C. 20515,
(202) 224-31221;

MORTIMER B. ZU ERMAN,
8 Arlington Street, Boston, Massachusetts 02116,
(617) 262-6500;

THE CHICAGO LAWYER, LTD.
220 South State Street,
Chicago, Illinois 60604
(312) 939-7150

THE CHICAGO RELIGIOUS TASK FORCE, ON CENTRAL AMERICA
407 South Dearborn Street, Suite 370,
Chicago, Illinois 60605,
(312) 427-2533;

FIRST PARISH CHURCH,
20 Lexington Road, Concord, Massachusetts 01742,
(617) 369-9602;

THE INSTITUTE FOR POLICY STUDIES,
1901 Q Street, NW, Washington, D.C. 20009,
(202) 234-9382;

UNITARIAN UNIVERSALIST SERVICE COMMITTEE,
78 Beacon Street, Boston, Massachusetts 02108,
(617) 742-2120;

THE WASHINGTON OFFICE ON LATIN AMERICA,
110 Maryland Avenue, NE,
Washington, D.C. 20002,
(202) 544-8045

DR. DANA McLEAN GREELEY,
276 Main Street,
Concord, Massachusetts 01742,
(617) 369-1842;

PHILLIPPE VILLERS,
20 Whits End Road,
Concord, Massachusetts 01742,
(617) 369-1053;
Plaintiffs,

v.

RONALD WILSON REAGAN,
President of the United States,
The White House,
1600 Pennsylvania Avenue,
Washington, D.C. 20500;

GEORGE P. SHULTZ,
Secretary of State,
Department of State,
Washington, D.C. 20520;

WILLIAM FRENCH SMITH,
Attorney General.
Department of Justice,
Washington, D.C. 20530; and

ALAN C. NELSON,
Director of the Immigration and
Naturalization Service,
425 I Street, N.W.,
Washington, D.C. 20536,
Defendants.

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief challenging defendants' refusal to grant a visa to Tomas Borge, Interior Minister of Nicaragua. It is brought by members of Congress and other interested Americans vitally concerned about recent events in Latin America and United States policy toward that region. To educate themselves further about those events, plaintiffs either arranged or planned to attend speaking engagements by Mr. Borge about the present situation in Nicaragua. The only asserted basis for Mr. Borge's exclusion from the United States is that, in defendants' view, his speech here would be "prejudicial to the public interest." As a result of that determination, the unique and important perspective that Mr. Borge can offer plaintiffs and other American citizens on United States policy in Central America has been barred from this country.

2. The exclusion of Mr. Borge from the United States for ideological reasons is not an isolated event. Rather, the defendants have employed their visa authority to shape and limit political debate within the United States. The purpose and effect of this policy has been to deny Americans the opportunity to hear and meet with significant and respected critics of American policy, and advocates of policies which differ from ours. Such a pattern and practice of ideological exclusions is inconsistent with the basic premises of a free society. Defendants' actions in this regard violate congressional intent as well as the constitutional guarantees of free speech and assembly embodied in the First Amendment.

JURISDICTION AND VENUE

3. Jurisdiction is properly vested in this Court pursuant to 28 U.S.C. §§ 1331 and 1361 and 8 U.S.C. § 1329,

over causes of action arising under 8 U.S.C. § 1182(a)(27), 5 U.S.C. § 702, and the First and Fifth Amendments to the Constitution.

4. The venue of this action lies in this district under the provisions of 28 U.S.C. § 1391 (e).

PLAINTIFFS

5. James Abourezk is an attorney and former United States Senator from South Dakota. He had scheduled a lunch at his home with Mr. Borge for members of Congress, Presidential candidates, and other interested persons.

6. Douglass Cassel, Jr., a citizen of the United States and the state of Illinois, is an attorney and a journalist. Having been advised by the Chicago Inter-Religious Task Force of Mr. Borge's visit to Chicago, Mr. Cassel arranged a number of discussions between Mr. Borge and various bar and business groups in Chicago, including a luncheon with officials of the International Business Council Mid-America and a reception at the Chicago Bar Association (CBA). These events were to have been held on December 5, 1983. Announcements to CBA's Board of Managers, its International Law Committee, and other of its committees, were prepared and about to be mailed when Mr. Cassel and CBA were informed that defendants had denied Mr. Borge's visa application. Mr. Cassel had intended to attend that and other receptions, and to interview Mr. Borge for plaintiff *Chicago Lawyer*. Mr. Cassel also had helped arrange an interview of Mr. Borge by the reporter who conducts a regular weekly international affairs program on an educational radio station in Chicago. Mr. Cassel was looking forward ~~to an ex~~change of views and information with Mr. Borge as a citizen and as a voter attempting to inform himself, as a professional with an interest in international law, and as a journalist. If Mr. Borge receives a visa to visit Chicago, Mr. Cassel intends

to interview him and to arrange discussions between him and various bar and business groups. Mr. Cassel has received continuing expressions of interest on meetings from both the CBA and International Business Council in the event Mr. Borge is granted a visa.

7. John Coatsworth is a Professor of History at the University of Chicago. He had planned a faculty luncheon and speaking engagement for Mr. Borge at the University of Chicago.

8. Reverend Harvey Cox is a Professor of Divinity at Harvard University. He had planned two meetings for Mr. Borge with religious leaders in the Boston area on December 9 and December 11, 1983.

9. Don Edwards is a member of Congress from the Tenth Congresional District in California. To better inform himself about events in Latin America, he had planned to meet with Mr. Borge during his visit to the United States.

10. Sidney Lens in a senior editor of Progressive magazine. He worked in conjunction with the Chicago Religious Task Force to set up the meetings referred to in paragraph 6.

11. George Overton is a citizen of Illinois, active in public affairs and concerned with the appropriate and correct action of this country in Central America. His ability to make judgments on the issues raised by current U.S. policies in Central America would have been enhanced by the presence of Mr. Borge in Chicago and the meetings that were scheduled between Mr. Borge and members of the public and the press. The exclusion of Mr. Borge therefore deprives the plaintiff of his right to receive free and uncensored information.

12. Richard Parker is the Executive Director of the Sunflower Foundation, a private foundation that gives grants to grass-roots organizations and funds international information exchanges. The Sunflower Foundation

had planned a reception with Mr. Borge at the UN Plaza Hotel on December 6, 1983, for funders interested in Central American problems and issues.

13. James M. Shannon is a member of Congress from the Fifth District of Massachusetts. To better inform himself about events in Latin America, he had planned to meet with Mr. Borge during his visit to the United States. He had arranged a meeting between Mr. Borge and the Massachusetts Congressional delegation for December 10, 1983.

14. Charles E. Schumer is a member of Congress from the 23rd District of New York. To better inform himself about events in Latin America, he intended to attend at least one of the meetings scheduled between Mr. Borge and members of Congress.

15. Paul Tsongas is a United States Senator from the state of Massachusetts. To better inform himself to fulfill his obligations as Senator and citizen he had planned to discuss the Central American situation with Mr. Borge in both Washington, D.C. and Boston.

16. Mortimer B. Zuckerman is the chairman of Atlantic Monthly Magazine. He had planned a brunch at his home with Mr. Borge on December 10, 1983, and invited church leaders, journalists, members of the banking and academic community, as well as Senators Tsongas and Kennedy.

17. The Chicago Lawyer, Ltd. is an Illinois limited partnership that publishes *Chicago Lawyer,* a monthly newspaper addressing issues of concern to the legal community in Chicago. *Chicago Lawyer* frequently publishes interviews with persons of interest to the legal community in Chicago, and has published previous interviews conducted by Mr. Cassel. Through its editor, *Chicago Lawyer* was engaged in discussions about publishing Mr. Cassel's planned interview of Mr. Borge at the time it learned that Mr. Borge's visa was denied. Mr. Cassel intends to inter-

view Mr. Borge, and *Chicago Lawyer* intends to publish that interview, if Mr. Borge receives a visa to visit Chicago.

18. The Chicago Religious Task Force on Central America is a coalition of more than 40 local religious groups engaged in education on Central America. It had coordinated a series of meetings for Mr. Borge with the Chicago legal, religious, business, academic and journalistic communities, including two speaking engagements on December 4 and December 5, 1983.

19. The First Parish Church had intended to sponsor a meeting for its parishioners with Mr. Borge during his visit to the Boston area.

20. The Institute for Policy Studies is an independent research organization and educational institute established in 1963. It had planned a reception for Mr. Borge on December 2, 1983 with Congressional staff as well as church, foreign policy and civil liberties groups. In addition, it had scheduled a seminar with Mr. Borge for Institute board, staff, and fellows on December 3, 1983.

21. The Unitarian Universalist Service Committee is a non-sectarian, Boston-based human rights agency. It had planned three days of meetings, press conferences, and speaking engagements for Mr. Borge in the Boston area from December 9-11, 1983, with religious, academic, business and press groups as well as civic leaders and members of the Massachusetts Congressional delegation.

21a. Dr. Dana McLean Greeley is minister of the First Parish Church (Unitarian) of Concord, Massachusetts. On behalf of his congregation, Dr. Greeley had planned to host a public meeting in December 1983 featuring Minister Borge.

21b. Mr. Philippe Villers is chairperson of the Social Responsibility Committee of the First Parish Church (Unitarian) of Concord, Massachusetts. Together with Dr.

Greeley, *supra* § 21a, he had planned to host a public meeting featuring Minister Borge during December 1983.

22. The Washington Office on Latin America is a non-profit, constituency-based human rights advocacy group established in 1974. Along with the Institute for Policy Studies, it had planned a large reception for Mr. Borge on December 2, 1983. It had also set up meetings for Mr. Borge with members of Congress on November 30, December 1, and December 2, 1983.

DEFENDANTS

23. Ronald Reagan is President of the United States. In this capacity, it is his duty to "take care that the laws be faithfully executed," and "to uphold the Constitution of the United States." He is responsible for all actions of all the defendants and their agents. Defendant Reagan is sued solely in his official capacity.

24. George P. Shultz is the Secretary of State of the United States and the executive head of the Department of State. In that capacity and through his agents, he issues non-immigrant visas under 8 U.S.C. § 210(a)(2) and determines ineligibility for receiving such visas under 8 U.S.C. § 1182(a)(27). Defendant Shultz is sued solely in his official capacity.

25. William French Smith is the Attorney General of the United States. In that capacity and through his agents, he exercises the power to bar visitors to the United States, including those who receive visas from the Secretary of State, under 8 U.S.C. § 1182(a)(27) and otherwise. Defendant Smith is sued solely in his official capacity.

26. Alan C. Nelson is the Commissioner of the Immigration and Naturalization Service. In that capacity and through his agents, he exercises the power to bar visitors to the United States, including those who receive visas from the Secretary of State. Defendant Nelson is sued soley in his official capacity.

STATEMENT OF THE CASE

27. In the fall of 1983, Mr. Borge received the invitations described above to meet with Americans from a wide range of backgrounds and to discuss with them and provide them information on Nicaraguan relations with the United States, the situation generally in Central America, and the chances of achieving peace in the region. Mr. Borge also received invitations to meet with, *inter alia,* other Congresspersons, the Council on Foreign Relations in New York, the Chicago Bar Association, the International Business Council in Chicago, the Wilson International Center for Scholars, and the School of Advanced International Studies.

28. For the purpose of accepting those invitations, Mr. Borge applied for a visa on or about November 15, 1983, to visit the United States temporarily, in late November and early December, for the stated purpose of meeting and speaking with members of Congress, other individuals, and the university, foreign affairs, and Bar groups which had scheduled meetings with him.

29. In late November, 1983, Mr. Borge's application for a visa was officially denied under Section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27). That section renders ineligible for visas

> [a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States.

30. On information and belief, defendants Shultz and Smith determinted to grant the visa, but President Reagan overruled their decisions.

31. On information and belief, the basis for the decision to deny the visa application was, in the words of an unnamed White House official quoted in the *New York*

Times, that "the government did not want to give Mr. Borge a propaganda platform in the United States."

32. On information and belief, had Mr. Borge sought a visa to enter the United States for sport, cultural or other non-political purposes, his visa would have been granted.

33. As recently as August 1983, defendants determined that Mr. Borge was eligible for a visa to enter the United States and to engage in discussions similar to those plaintiffs have scheduled with Mr. Borge.

34. The defendants do not in fact know or have reason to believe that Mr. Borge plans to or would engage in any activities within the United States on his proposed visits that would be prejudicial to the public interest or endanger the welfare, safety or security of the United States or would otherwise be in violation of the Immigration and Nationality Act.

35. Upon information and belief, the defendants denied Mr. Borge a visa because of his political views and the expected content of his speech in the United States.

36. Upon information and belief, the denial of a visa to Mr. Borge is part of a pattern and practice by defendants of denying visas to foreign critics of American policy in Central America and elsewhere, particularly those with special knowledge or credibility.

37. Upon information and belief, the denial of a visa to Mr. Borge is only one aspect of the government's pattern and practice of unlawfully curtailing the information available on foreign affairs to American citizens by a variety of means.

38. Defendants' exclusion of Mr. Borge from the United States is not authorized by Section 212(a)(27), and is not based on legitimate, lawful and bona fide reasons.

39. On information and belief, defendants' exclusion of Mr. Borge is intended to preclude congressional critics of United States policy concerning Nicaragua from informing themselves, their colleagues in Congress, and their

constituents, so as to be able effectively to discharge their constitutional functions.

40. Defendants' exclusion of Mr. Borge has the effect of precluding congressional critics of United States policy concerning Nicaragua from informing themselves, their colleagues in Congress, and their constituents, so as to be able effectively to discharge their constitutional duties.

41. The invitations extended to Mr. Borge by plaintiffs and others is open and continuing and Mr. Borge has accepted the invitations on a continuing basis, contingent on the granting of a visa.

42. Defendants' actions in this case have caused and continue to threaten irreparable damage to plaintiffs' First Amendment rights as citizens and voters to meet, converse and inform themselves about some of the most critical issues facing America today.

43. Defendants' actions in this case are arbitrary and capricious.

44. Plaintiffs lack any adequate remedy at law.

CAUSES OF ACTION

45. Defendants' actions in this case are not authorized by section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), which bars any alien who seeks "to enter the United States solely, principally, or incidentally to engage in *activities* which would be prejudicial to the public interest or endanger the welfare, safety or security of the United States" (emphasis added). It neither contemplates nor permits the exclusion of aliens based on political beliefs or associations or the anticipated content of an alien's political speech in the United States.

46. Defendants' refusal to grant Mr. Borge a visa is not based on any knowledge or "reason to believe" that he seeks "to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." Absent such knowledge or

reason to believe, defendants' actions exceed their statutory authority under section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27).

47. For the reasons recited above, defendants' refusal to grant Mr. Borge a visa to speak in the United States is arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

48. Insofar as section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), is construed to permit the exclusion of an alien on the basis of his political associations or the political speech in which he would engage were he admitted, it constitutes a vague, overbroad and standardless delegation of authority to the Executive branch to curtail political debate in the United States on the basis of content in violation of the First Amendment.

49. Defendants' exclusion of Mr. Borge from the United States abridges the right of plaintiffs, as well as others in this country, to meet, discuss and exchange ideas on subjects of vital national interest, in violation of the First Amendment.

50. Defendants' application to this case of section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), is part of a pattern and practice of ideological exclusions by the Executive branch which has limited the opportunities for citizens in this country to meet, discuss and exchange ideas with foreigners holding controversial views, in violation of the First Amendment.

51. Defendants' application of 8 U.S.C. § 1182(a)(27) to bar certain aliens who seek visas to engage in political speech in the United States, but not to bar those same aliens or persons similarly situated who seek visas for sport, cultural or other non-political purposes, constitutes a content-based discrimination against political speech in violation of the First Amendment and denies plaintiffs the equal protection of the laws.

52. Defendants exclusion of Mr. Borge is intended and has the effect of limiting Congress' capacity to inform itself fully as to matters concerning Nicaragua, thereby depriving Congress of the information it requires to undertake its legislative function, in violation of the doctrine of separation of powers.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief against the defendants, their successors and subordinates:

a) A declaration that defendants' refusal to grant Mr. Borge an entry visa is not authorized by section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), and violates the free speech guarantee of the First Amendment;

b) An order directing defendants to issue Mr. Borge an appropriate entry visa so that he may accept the invitations proffered by plaintiffs and other groups in this country who wish to hear his views;

c) An injunction prohibiting defendants from continuing to interpret and apply section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), in a manner that is inconsistent with the terms and intent of the statute and which violates the guarantees of the First Amendment;

d) Such other and further relief as this Court deems just and proper; and

e) The costs and attorneys' fees incurred in this action.

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In the Supreme Court of the United States

RONALD W. REAGAN, PETITIONER

v.

JAMES ABOUREZK, ET AL.

ORDER ALLOWING CERTIORARI. *Filed December 15, 1986.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the District of Columbia* is granted.

Justice Scalia took no part in the consideration or decision of this petition.

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Supreme Court, U.S.
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No. 86-656

In the Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, ET AL., PETITIONERS

v.

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GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

BRUCE CRONIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1182(a)(27) permits denial of a visa to an alien only if his activities—and not just his presence or entry—would be prejudicial to the public interest.

2. Whether 8 U.S.C. 1182(a)(27) permits denial of a visa to an alien based on foreign policy concerns only if those concerns are independent of—and not just in addition to—the alien's affiliation with organizations listed in 8 U.S.C. 1182(a)(28).

PARTIES TO THE PROCEEDING

Petitioners in *Reagan* v. *Abourezk* are President Ronald Wilson Reagan, Secretary of State George P. Shultz, Attorney General Edwin Meese III, and Commissioner of the Immigration and Naturalization Service Alan C. Nelson; petitioners in *Shultz* v. *City of New York* and *Shultz* v. *Cronin* are Secretary Shultz, Attorney General Meese, and Commissioner Nelson. Respondents in *Reagan* v. *Abourezk* are James Abourezk, Douglas Cassel, Jr., John Coatsworth, Rev. Harvey Cox, Don Edwards (individually and as a Member of the House of Representatives), Sidney Lens, George Overton, Richard Parker, Charles E. Schumer (individually and as a Member of the House of Representatives), James M. Shannon (individually and as a Member of the House of Representatives), Paul Tsongas (individually and as a Member of the House of Representatives), Mortimer B. Zuckerman, Chicago Lawyer, Ltd., Chicago Religious Task Force on Central America, First Parish Church of Concord, Massachusetts, Institute for Policy Studies, Unitarian Universalist Service Committee, Washington Office on Latin America, Dr. Dana McLean Greeley, and Phillippe Villers; respondents in *Shultz* v. *City of New York* are the City of New York, Edna Acosta-Belen, Chai Feldblum, Jill Gay, Thomas H. Holloway, Sally McConnell-Ginet, Barbara Corrado Pope, David S. Rudstein, Mary Kay Vaughan, Committee on Religion, Ethics and Social Policy, Committee on U.S.-Latin American Studies, Institute for Policy Studies, and New College of California; respondents in *Shultz* v. *Cronin* are Bruce Cronin, Judith Freiwirth, Anthony Palomba, Mobilization for Survival, Boston Mobilization for Survival, and New England Campaign to Stop the Euromissiles.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 785 F.2d 1043. The opinion of the district court (Pet. App. 65a-80a) is reported at 592 F. Supp. 880.

JURISDICTION

The judgment of the court of appeals (Pet. App. 82a-83a) was entered on March 11, 1986. A petition for rehearing and a suggestion of rehearing en banc were denied on May 23, 1986 (Pet. App. 84a, 85a). On August 13, 1986, Justice White extended the time for filing a peti-

tion for a writ of certiorari to September 20, 1986. On September 16, 1986, Chief Justice Burger further extended the time for filing to and including October 20, 1986. The petition for a writ of certiorari was filed on October 20, 1986, and was granted on December 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. (& Supp. III) 1182 provides in relevant part:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;
>
> (28) Aliens who are, or at any time have been, members of any of the following classes:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct

predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt * * *.

* * * * *

22 U.S.C. 2691 provides:

(a) For purposes of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for purposes of encouraging other signatory countries to comply with those provisions, the Secretary of State should, within 30 days of receiving an application for a nonimmigrant visa by any alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such alien, unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate. Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization.

(b) This section does not apply to representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state.

(c) This section does not apply with respect to any alien who is a member, officer, official, representative, or spokesman of the Palestine Liberation Organization.

(d) The Secretary of State may refuse to recommend a waiver for aliens from signatory countries which are not in substantial compliance with the provisions of the Helsinki Final Act, particularly the human rights and humanitarian affairs provisions.

STATEMENT

1. a. The terms and conditions under which aliens may enter the United States, as visitors or as immigrants, are set forth in the Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. III) 1101 *et seq.* (Immigration Act or Act). The Act is administered jointly by the Attorney General, the Secretary of State, and United States consular officers abroad. 8 U.S.C. 1103, 1104.

With exceptions not relevant here, no alien may enter the United States without first having applied for and obtained an immigrant or nonimmigrant visa. See 8 U.S.C. 1181(a), 1182(a)(26). Nonimmigrant visas are issued to aliens seeking temporary admission into the United States for one or more of the purposes specified in 8 U.S.C. 1101(a)(15). The authority to grant or deny such visas is assigned to consular officers (8 U.S.C. 1201, 1202), and no visa may be issued if the consular officer "knows or has reason to believe" that the applicant is ineligible to receive a visa under the Act (8 U.S.C. 1201(g)).[1]

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[1] The alien has "the burden of proof * * * to establish that he is eligible to receive such visa * * * or is not subject to exclusion under any provision of [the Act]." 8 U.S.C. 1361. Any alien may apply or reapply for a visa at any time, and each visa application is given independent consideration by the consular officer on the basis of the facts and circumstances known at the time of the particular application. See 22 C.F.R. 41.90.

Section 1182(a) of the Act lists 33 separate categories of aliens who "shall be ineligible to receive visas and shall be excluded from admission into the United States." Two categories are at issue in these cases, 8 U.S.C. 1182(a)(27) (Subsection 27) and 8 U.S.C. 1182(a)(28) (Subsection 28). Subsection 27 applies to "[a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Subsection 28 applies, inter alia, to aliens who are, or at any time have been, "members of or affiliated with * * * the Communist or any other totalitarian party * * * of any foreign state, [or] * * * any * * * affiliate * * * of any such * * * party."

Under 8 U.S.C. 1182(d)(3)(A), aliens falling into 30 of the 33 categories contained in Section 1182(a) may, in certain circumstances, still be granted a visa. A visa may issue to such aliens if, inter alia, the Secretary of State or consular officer recommends that a visa be granted, and the Attorney General, in his discretion, approves the recommendation. Subsection 28 is one of the categories subject to this waiver of ineligibility; Subsection 27 is one of the three categories that is not.

Certain standards for the Secretary of State's determination whether to recommend a waiver to the Attorney General under Section 1182(d)(3)(A) for aliens otherwise excludible under Subsection 28 are prescribed by 22 U.S.C. 2691, commonly known as the McGovern Amendment. The Amendment provides that the Secretary "should" make such a waiver recommendation in the case of "any alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization," unless the Secretary certifies to Congress that "the admission of such alien would be contrary to the security interests of the ~~Untied~~ United States." 22 U.S.C. 2691(a).

The Amendment provides, however, that it does not authorize or require "the admission * * * of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization." *Ibid.*

b. Applications for nonimmigrant visas do not typically raise foreign policy concerns.[2] In certain cases, however, the decision whether to grant or deny a visa has significant diplomatic consequences. As explained in the affidavit of then-Under Secretary of State for Political Affairs Lawrence S. Eagleburger (J.A. 57-58):[3]

> The overwhelming majority of NIV [nonimmigrant visa] applications involve only the ordinary circumstances of aliens seeking to visit the United States

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[2] According to an affidavit filed in the district court in March 1984, for the preceding 20-year period in which the State Department had kept such statistics (1963-1983), consular officers issued nearly 70 million nonimmigrant visas, and denied (on foreign policy *or* internal security grounds) only 519 applications for such visas under Subsection 27 (J.A. 89). During the most recent period, from 1981 through 1983, six to seven million nonimmigrant visas had been granted annually, and an average of less than 30 were denied under Subsection 27 (*ibid.*). These figures are also found in the Statement of Joan M. Clark, Assistant Secretary of State for Consular Affairs, Department of State, *Exclusion and Deportation Amendments of 1983: Hearing on H.R. 4509 and H.R. 5227 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 90 (1984); and Bureau of Consular Affairs, Dep't of State, *Reports of the Visa Office* (FYS-1980, 1981, 1982). See also J.A. 59 ("denial of [nonimmigrant visa] applications for reasons of foreign policy is extremely rare").

[3] In the district court, in support of its motion to dismiss or, in the alternative, for summary judgment, the government submitted one public affidavit of Under Secretary Eagleburger (J.A. 56-82) and two public affidavits of Deputy Assistant Secretary of State Louis P. Goelz (J.A. 83-93, 110-114). The government also filed three classified affidavits from Under Secretary Eagleburger, which were submitted for the district court's in camera inspection (Pet. App. 86a-94a). These

> for reasons of business or pleasure. However, in some instances, the issuance, denial or revocation of a NIV to a particular alien can have significant diplomatic or foreign policy ramifications to the extent that the issuance or denial is construed as an act of the United States Government. Thus, for example, the issuance or denial of a visa to a foreign government official may be taken by the alien's government as a reflection of United States foreign policy vis-a-vis that government and may result in reciprocal action or retaliation by that government. Similarly, the denial of visas to foreign government officials is one of the tools available to a government to communicate its attitude about the policies of other states.

See also J.A. 62; Pet. App. 86a, 90a-91a.

For these reasons, the Department of State provides special guidance to its consular officers whenever visa applications raise national security or foreign policy concerns. In such cases, agency guidelines require consular officers to refer the case to the Department for an advisory opinion prior to the issuance or refusal of a visa. Advisory opinions are particularly required when a consular officer has reason to believe that an applicant may be ineligible under Subsection 27. See J.A. 58; 9 Dep't of State, *Foreign Affairs Manual*, Pt. I , § 41.91(a)(27) (1975). The Department renders an advisory opinion "only after a thorough review of the information available to the Department and the recommendations of those officers

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classified affidavits were also submitted in camera to the court of appeals.

Following the remand of these cases from the court of appeals, the government determined that the passage of time would permit declassification of nearly all of the in camera affidavits. Only one paragraph and part of one sentence in one of the affidavits (see Pet. App. 92a, 94a) remain classified. The affidavits, as declassified, have been provided to respondents.

responsible for the geographic and policy areas affected" (J.A. 59). Only the Assistant Secretary of State for Consular Affairs or a superior officer may issue an opinion advising against issuance of a visa on foreign policy grounds (J.A. 89). In sensitive cases, the Secretary of State or his immediate designee (such as the Under Secretary of State for Political Affairs) may make the determination (*ibid.*).

2. Tomas Borge, Olga Finlay, Leonor Rodriguez Lezcano, and Nino Pasti applied for nonimmigrant visas to meet and talk with American citizens who had invited them to come to the United States. Based on advisory opinions from the Department of State, consular officers denied each application under Subsection 27.

a. Tomas Borge was invited by the plaintiffs in *Abourezk* v. *Reagan*.[4] Borge is the Interior Minister of Nicaragua, and one of the highest ranking and most influential members of the Sandinista Front for National Liberation, the ruling body of Nicaragua (Pet. App. 86a; J.A. 90). In November 1983, the Nicaraguan government submitted a diplomatic note to the United States Embassy in Managua, Nicaragua, requesting that Borge be issued a nonimmigrant visa for a five-day visit to the United States (J.A. 90). The request was accompanied by a diplomatic passport that the Nicaraguan government had issued to Borge (Pet. App. 86a-87a).

Under Secretary Eagleburger rendered an advisory opinion that Borge was ineligible for a visa under Subsection 27, having determined that his admission would be "highly prejudicial to the foreign policy interests of the United States" (see Pet. App. 88a). See also J.A. 60, 90. In making this judgment, Eagleburger concluded, inter alia, that Borge "intended to travel to the United States *in his*

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[4] The plaintiffs in *Abourezk*—members of Congress, university professors, journalists, and religious leaders—invited Borge to the United States to discuss issues regarding Central America and Nicaragua. See Pet. App. 5a, 66a; J.A. 3.

official capacity," and that his admission at that particular time would send "a very wrong message to our allies and adversaries alike concerning United States policies in Central America, and could have had a severely adverse impact on ongoing multilateral efforts by the United States to resolve the current conflict in that region" (Pet. App. 86a-87a (emphasis in original)). Eagleburger further noted that a visit in October 1983 by the Foreign Minister of Nicaragua had "undercut * * * multilateral negotiations" (*id.* at 87a).

b. Olga Finlay and Leonor Rodriguez Lezcano were invited by the plaintiffs in *City of New York* v. *Shultz*.[5] Both are officials of the Communist Party of Cuba, and both are members of the Federation of Cuban Women, an organization which the Department of State has determined to be affiliated with and controlled by the Cuban Communist Party (Pet. App. 89a; J.A. 91-92). Finlay, in addition, is the Cuban representative to the United Nations Commission on the Status of Women (J.A. 91). In September 1983, Finlay and Lezcano applied for 30-day, nonimmigrant visas to the United States. Their applications were accompanied by diplomatic passports, and were transmitted to the consular officer in Havana, Cuba, by diplomatic note. Pet. App. 90a; J.A. 92.

The Assistant Secretary for Consular Affairs, in an advisory opinion ratified by Under Secretary Eagleburger, determined that Finlay and Lezcano were ineligible for visas under Subsection 27, since their entry would prejudice the foreign affairs of the United States (see J.A. 61, 92). In Eagleburger's view, both applicants "intended to travel to the United States not as private Cuban citizens,

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[5] The plaintiffs in *City of New York* – the New York City Commission on the Status of Women and several women's studies programs at various universities – invited Finlay and Lezcano to the United States to discuss issues concerning women. See Pet. App. 6a, 67a; J.A. 32-33.

but rather as official representatives of the Cuban Government" (Pet. App. 90a; see J.A. 61). He found that "[t]he official, governmental nature of their proposed trip was clearly manifested both by the issuance to the two women of Cuban diplomatic passports and by the submission of their applications through diplomatic channels" (*ibid.*). Eagleburger concluded that their entry would be inconsistent with our foreign policy toward Cuba, a policy which seeks to curb Cuban influence in Central and South America by denying to it "the aura of legitimacy which normal diplomatic relations with the United States would undoubtedly confer" (Pet. App. 90a).

c. Nino Pasti was invited by the plaintiffs in *Cronin* v. *Shultz*.[6] Formerly a general in the Italian military and a member of the Italian Senate, Pasti is an active participant in the World Peace Council, an organization which the State Department has determined is "controlled and financed" by, and is an "instrumentality" of, the Soviet Union (Pet. App. 92a; J.A. 90-91). In September 1983, Pasti applied to the American Embassy in Rome for a nonimmigrant visa (J.A. 91).

As in the other cases, Pasti's application was referred by the consular officer to the Department of State for an advisory opinion (J.A. 91). The opinion, authored by the Assistant Secretary of State for Consular Affairs, concluded that Pasti was ineligible to receive a visa under Subsection 27, because his admission would prejudice the conduct of United States foreign policy (see J.A. 61, 91). Under Secretary Eagleburger, who ratified the opinion, noted that the World Peace Council is an instrument for Soviet efforts to disrupt American foreign policy; he emphasized that the timing of Pasti's proposed trip coincided

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[6] The plaintiffs in *Cronin* are principally groups advocating nuclear disarmament. They invited Pasti to attend and speak at a rally in Boston. Pet. App. 5a, 66a-67a; J.A. 46.

with the "particularly delicate period" during the controversial "initial deployment of Cruise and Pershing II missiles in certain NATO countries" (Pet. App. 92a-94a).

3. a. The individuals and groups who invited these four aliens each filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Columbia. Plaintiffs alleged that the government acted without statutory authority in denying the visas because: Subsection 27 does not authorize exclusion on the basis of foreign policy (as opposed to national security) concerns; Subsection 27 does not authorize the exclusion of an applicant when it is his mere entry or presence (as opposed to the specific activities in which he intends to engage) that will be prejudicial to the public interest; and the government's interpretation of Subsection 27 is contrary to the McGovern Amendment, 22 U.S.C. 2691. Plaintiffs also complained that the visa denials in these cases violated their First Amendment rights to associate with their invitees and listen to them in this country. Finally, plaintiffs contended that Subsection 27, as construed by the government, is an overbroad delegation of legislative authority, contrary to separation of powers principles. Pet. App. 14a; J.A. 30-55, 115-130.

The district court entered summary judgment for the government (Pet. App. 81a). Judge Greene rejected each of plaintiffs' statutory arguments, concluding that the government's actions were fully within the ambit of Subsection 27 (*id.* at 72a-75a). The court further held that under *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the facially legitimate and bona fide reasons advanced by the government in support of its actions defeated plaintiffs' First Amendment claims (Pet. App. 75a-80a). In addition, the district court rejected plaintiffs' separation of powers argument, noting that "in foreign affairs matters and

those involving the admission of aliens, the political branches have the widest possible latitude" (*id.* at 76a n.19).

b. On appeal, a divided panel vacated the district court's judgment and remanded for further proceedings (Pet. App. 82a-83a). The court agreed with the government that Subsection 27 may properly be invoked to deny visas because of foreign policy concerns (*id.* at 14a-16a), but ruled against the government and remanded on two other statutory issues.[7]

It found, first, that the record was inadequate to decide whether Subsection 27 permits exclusion based only on concerns sparked by an alien's entry or presence in the United States (Pet. App. 16a-22a). In reaching this conclusion, the court noted that the language of Subsection 27 refers only to an alien's expected "activities," not his presence or entry (*id.* at 16a). Nor, in the court's view, did the legislative history resolve the issue in the government's favor; instead, the court found that the history "is terse and tugs in more than one direction" (*id.* at 17a). Similarly, the court found that the evidence of administrative practice was too "meager" to give rise to a presumption of congressional acquiescence in the government's view that Subsection 27 applies to entry or presence (*id.* at 21a).[8]

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[7] The court also rejected the government's threshold objections to judicial review: that the cases were moot, that plaintiffs lacked standing, and that the district court lacked subject matter jurisdiction (Pet. App. 8a-13a).

[8] The court nevertheless found in the record "at least one instance, of which Congress was apprised," in which the State Department actually excluded an alien because of concerns about his mere presence in the United States (Pet. App. 21a). The court also recognized that 9 Dep't of State, *Foreign Affairs Manual*, Pt. II, § 41.91(a)(27)(1.4) (1975), gave as an example of an alien excludible under Subsection 27 one who engaged in physical brutality while in political power (Pet. App. 19a-20a); the court acknowledged that this "example in the

Nevertheless, believing that "[i]nformation about such acquiescence, or the absence of it, would rank as a significant indicator of the legislature's will" (*id.* at 18a), the court remanded for "fuller proceedings" on the nature of administrative practice under Subsection 27 (*id.* at 22a).

Second, the court ruled that the district court had improperly analyzed the relationship between Subsection 27 and Subsection 28 (Pet. App. 22a-30a). The court held that the government may exclude aliens under Subsection 27 for foreign policy reasons only if those reasons are "*independent of*" and not merely "*in addition to*" the fact that the aliens are members of, or affiliated with, the communist and anarchist organizations listed in Subsection 28 (*id.* at 24a (emphasis in original)). Any other holding, the court reasoned, would "nullif[y]" the restrictions placed by the McGovern Amendment on the use of Subsection 28 (*id.* at 23a); for this point the court (*id.* at 23a-24a n.16) relied in part on a similar holding in *Allende* v. *Shultz*, 605 F. Supp. 1220 (D. Mass. 1985). In adopting this interpretation, the court recognized that affiliation with a hostile government may qualify as proper grounds for the denial of a visa under Subsection 27, but held that such affiliation may not be "presumed *because of* the applicant's membership or participation in a subsection (28) organization" (Pet. App. 27a (emphasis in original)). The court therefore remanded for a determination as to whether governmental affiliation, independent of organizational affiliation, was "*the* reason" for the exclusions in these cases (*id.* at 27a-28a (emphasis in original)).

In view of its rulings on the statutory issues, the court declined to consider plaintiffs' constitutional claims (Pet. App. 30a n.24).

Manual may represent an open assertion of the power to exclude under subsection (27) on the basis of entry alone" (*id.* at 20a).

c. Judge Bork dissented (Pet. App. 34a-64a). He concluded that the majority's decision deprived the Executive "of much of the flexibility and nuance that are essential in the conduct of foreign relations" (*id.* at 60a), and began "a process of judicial incursion into the United States' conduct of its foreign affairs" (*id.* at 64a).

Judge Bork criticized the majority's analysis of the "entry/presence" issue (Pet. App. 38a-47a). In his view, the legislative history of Subsection 27 and its statutory predecessors unambiguously settles the question. That history, he found, includes at least six occasions in which Congress clearly interpreted the term "activities" to "encompass[] entry and presence as well" (*id.* at 42a; see *id.* at 38a-42a). Furthermore, to the extent that the issue could be considered close, Judge Bork noted that under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the courts must defer to a reasonable administrative interpretation, especially in the foreign policy context (Pet. App. 36a-38a, 43a). Applying the *Chevron* test, he found "it difficult to understand how an interpretation offered half a dozen times by Congress * * * can possibly be unreasonable when adopted by officials in the executive branch" (*id.* at 43a). Given the reasonableness of the Executive's view that Subsection 27 applies to mere presence or entry, Judge Bork found no need for evidence of congressional acquiescence, and thus no need for the majority's remand on this issue (*id.* at 44a-47a). Moreover, Judge Bork found that evidence supporting the government's position already existed in the record (*id.* at 44a-45a n.2).

Judge Bork also disagreed with the majority's interpretation of the McGovern Amendment and its analysis of the relationship between Subsections 27 and 28 (Pet. App. 47a-60a). He thought it clear, based on the statute's language and legislative history, that Congress intended the restrictions in the Amendment to apply only "when the

sole ground for exclusion is membership in an organization of the sort described [in Subsection 28]. When that membership raises additional concerns, as it does when it involves a connection to a government that implicates American foreign policy, subsection (27) comes into play," and the McGovern Amendment does not apply (*id.* at 53a). Since in the present cases the Executive has "consistently cited" the aliens' affiliations with particular foreign governments as the basis for exclusion, Judge Bork concluded that the McGovern Amendment is inapposite (*id.* at 54a). Judge Bork emphasized that his interpretation fully serves the intent of the McGovern Amendment, since it would not justify the wholesale exclusion of all members of Subsection 28 organizations, but only those whose organizations are connected to foreign governments (*id.* at 55a-56a). Judge Bork wrote, for example, that "[i]t would seem entirely rational for the State Department to conclude that a member of the Communist Party of the Soviet Union was affiliated with the government of that nation but that a member of the Communist Party of the United Kingdom was not affiliated with the government of his country" (*id.* at 55a). On the other hand, he pointed out, the majority's interpretation leads to the anomalous result of "confer[ring] upon communists a favored entry status": members of non-Subsection 28 organizations may be excluded under Subsection 27 because their organizations are tied to hostile regimes, but members of Subsection 28 groups may not (*id.* at 56a). Further, Judge Bork noted that the majority's construction, although adopted to prevent the Executive from "evading" the McGovern Amendment, is "toothless"—and thus fails on its own rationale—for two reasons (*id.* at 57a-59a). First, because the Amendment states only that the Secretary of State "should"—not "shall"—recommend the admission of a member of a proscribed organization,

"it is at least an open question whether the terms of the * * * Amendment are in fact mandatory" (*id.* at 57a). Second, even if the Secretary were obligated to render a favorable recommendation, the Attorney General, under 8 U.S.C. 1182(d)(3), would have complete discretion not to accept it (Pet. App. 58a-59a).

Having concluded that Subsection 27 thus authorized the exclusions in these cases, Judge Bork also addressed plaintiffs' First Amendment argument. He found this argument "obviously" without force under *Kleindienst* v. *Mandel, supra*, and other "clear and consistent" Supreme Court precedent (Pet. App. 60a, 63a). Judge Bork pointed out that the aliens here were not denied visas because of the content of their political beliefs, but because they "are members of or connected with particular foreign governments" (*id.* at 62a). Judge Bork also rejected plaintiffs' argument that the discretion delegated to the Executive under Subsection 27 is so broad that it violates separation of powers principles; he found the challenge insubstantial under the many rulings by this Court upholding the constitutionality of "broad and discretionary Executive power" in the foreign policy arena (*id.* of 63a).

d. The government petitioned the court of appeals to rehear these cases en banc. Of the court's eleven judges, five voted in favor of granting the petition, four voted against, and two did not participate in the vote. Accordingly, the petition was denied. Pet. App. 85a.

SUMMARY OF ARGUMENT

A. Contrary to the opinion of the court of appeals, Subsection 27 authorizes the exclusion of aliens whose entry or presence in the United States raises foreign policy concerns. The district court correctly pointed out that "the distinction between an alien's activities and his presence in the United States is one without a difference" (Pet. App. 72a-73a). Any person admitted must engage in some ac-

tivity, and entry alone can have dramatic effects on American foreign policy (*e.g.*, the admission of the Shah of Iran). And, as Judge Bork tellingly noted in dissent, "it would be surprising if Congress meant to bar aliens who would engage in prejudicial activities, but admit those whose very entry would be prejudicial to the public interest" (*id.* at 40a). Moreover, Subsection 29, 8 U.S.C. 1182(a)(29), argues against drawing such a distinction, because in it Congress limited an exclusionary provision to conduct "after entry," and because such a distinction would render Subsections 27 and 29 largely duplicative.

Indeed, the legislative history of Subsection 27 demonstrates that Congress intended the provision to exclude aliens whose entry or presence would compromise the conduct of foreign policy. At all events, that history shows that the State Department's interpretation is entirely reasonable. Accordingly, that interpretation, by the agency charged with issuing visas under the Immigration Act, warrants judicial deference (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984)), especially given the foreign policy context. Finally, even if evidence of administrative practice were needed to decide the "entry/presence" issue, the court of appeals' remand is unnecessary, in light of the ample existing evidence "that the Executive has 'openly asserted' the power at issue." *Haig* v. *Agee*, 453 U.S. 280, 303 (1981) (quoting *Zemel* v. *Rusk*, 381 U.S. 1, 9 (1965)).

B. The court of appeals also erred in rejecting the government's contention that Subsection 27 authorizes the exclusion of an alien for reasons which are in addition to—even if they are not independent of—the alien's association with Subsection 28 organizations. Where, as in these cases, that association raises concerns beyond the association per se—such as when the organization is connected with a foreign government and the alien's entry therefore will create foreign policy problems—the

McGovern Amendment does not preclude application of Subsection 27. The alien's association in the organization is no longer the sole ground for exclusion: in the words of the Amendment, the "alien * * * is excludible for reasons other than membership or affiliation with a proscribed organization."

Congress and the Executive have consistently interpreted the McGovern Amendment in precisely this way, as the legislative history and two subsequent amendments to the Amendment demonstrate. Furthermore, the court of appeals' interpretation of the Amendment would create anomalous results, conferring a *favored* entry status on those who are members of Subsection 28 organizations and requiring the Executive to ignore established affiliations, no matter how close, between such organizations and foreign governments. The opinion below is also inconsistent with the approach this Court has taken to overlapping provisions of the Immigration Act. See *Reid* v. *INS*, 420 U.S. 619 (1975). Finally, once again the State Department's intepretation of the relationship between Subsection 27 and the McGovern Amendment is plainly not unreasonable, and is entitled to deference, especially in this foreign policy context.

C. The court of appeals' remand order further demonstrates that its reading of the Immigration Act is incorrect, and it is unsupportably intrusive independently of that error. The court's construction of Subsection 27 and the McGovern Amendment has led it to require that the district court—and respondents—be allowed to "look behind" the "facially legitimate and bona fide reason[s]" offered by the Executive for its visa denials, in precisely the manner this Court forbade in *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972). Indeed, this process has already been initiated, in the court of appeals' opinion and in respondents' discovery requests.

Moreover, Subsection 27 has been used sparingly and carefully, and only when "significant diplomatic or foreign policy ramifications" were at stake (J.A. 57-58). Thus, the court of appeals' decision would not only enmesh courts in questions outside the bounds of judicial competence, it would "depriv[e] [the Executive] of much of the flexibility and nuance that are essential in the conduct of foreign relations" (Pet. App. 60a (Bork, J., dissenting)). The court's decision would also require the State Department to ignore obvious alter ego relationships between certain Subsection 28 organizations and foreign states. These unseemly consequences further demonstrate that the court erred in its construction of the statutes at issue.

ARGUMENT

THE GOVERNMENT'S DENIAL OF THE VISA APPLICATIONS AT ISSUE WAS AUTHORIZED BY SUBSECTION 27

A. Subsection 27 Authorizes Exclusion Where An Alien's Entry Or Presence In The United States Raises Foreign Policy Concerns

In refusing to resolve the "entry/presence" issue on the record before it, the court of appeals failed to "give effect to the unambiguously expressed intent of Congress" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted)), as evidenced by the statute's language, structure, and legislative history. In any event, the State Department's interpretation is an entirely reasonable one and thus entitled to deference (*id.* at 842-845), especially in the foreign affairs context. Finally, there already exists ample evidence that this intepretation is supported by past administrative practice.

1. The concern of Subsection 27 is whether an alien's "activities" cause prejudice to the "public interest" or "endanger the welfare, safety or security of the United

States." Since any person admitted to this country must engage in some activity, "the distinction between an alien's activities and his presence" is, as Judge Greene noted, "one without a difference" (Pet. App. 72a-73a). Recent history amply demonstrates that the distinction between entry and activity is basically irrelevant to the statutory purpose. As Judge Greene observed, "[t]he mere entry of the Shah [of Iran] into the United States and his presence in this country had the most serious consequences for the United States, including the seizure of American hostages in Teheran and all that flowed from that episode" (*id.* at 73a). As a matter of common sense, "it would be surprising if Congress meant to bar aliens who would engage in prejudicial activities, but admit those whose very entry would be prejudicial to the public interest" (*id.* at 40a (Bork, J., dissenting)).

In sharp contrast, Subsection 29, 8 U.S.C. 1182(a)(29) (emphasis added), requires denial of visas to aliens who "*after entry*" would engage in certain proscribed conduct, including "espionage, sabotage, public disorder, or * * * other activity subversive to the national security." An interpretation that would also limit Subsection 27 to such activities would render it largely duplicative of Subsection 29—a result that would "offend[] the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) (citations omitted).

2. Moreover, as exhaustively set forth in Judge Bork's dissent (Pet. App. 38a-42a), the legislative history on this issue—particularly the history of the forerunners to Subsection 27—is decisive. See *INS* v. *Errico*, 385 U.S. 214, 218 (1966) (construction of disputed statute "requires close attention" to the language and legislative history of its predecessor).

Subsection 27 was taken almost verbatim from Section 22 of the Internal Security Act of 1950, ch. 1024, 64 Stat. 1006.[9] The Senate Report accompanying the 1950 Act stated that existing law in this area—which Section 22 was intended to "*broaden*[]"—already excluded aliens "whose *entry* would be prejudicial to the public interest or would endanger the safety of the United States." S. Rep. 2230, 81st Cong., 2d Sess. 5 (1950) (emphasis added). The same language is used in S. Rep. 2369, 81st Cong., 2d Sess. 10 (1950). See also S. Rep. 1137, 82d Cong., 2d Sess. 27 (1952) (emphasis added) (report on the Immigration Act, which refers to Subsections 27, 28, and 29 as barring inter alia "alien[s] whose *entry* would endanger the public safety or security of the United States").

Section 22, in turn, was derived from a 1941 statutory provision (Act of June 20, 1941, ch. 209, § 1, 55 Stat. 252),[10] whose legislative history clearly contemplated exclusion of aliens when their entry or presence would injure the public safety. The Senate Report accompanying that provision described it as having the purpose "of keeping

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[9] Both the House and Senate reports stated that Subsection 27 merely "incorporate[s]" Section 22 of the Internal Security Act of 1950. S. Rep. 1137, 82d Cong., 2d Sess. 10 (1952); H.R. Rep. 1365, 82d Cong., 2d Sess. 30, 49 (1952). Section 22 excluded from admission:

> [a]liens who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States * * *.

[10] Section 1, 55 Stat. 252 provided:

> [W]henever any American diplomatic or consular officer knows or has reason to believe that any alien seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States, he shall refuse to issue to such alien any immigration visa, passport visa, transit certificate, or other document entitling such alien to present himself for admission into the United States * * *.

out of this country certain aliens, otherwise admissible, whose *presence* in the United States would be dangerous to the public safety." S. Rep. 386, 77th Cong., 1st Sess. 1 (1941) (emphasis added). This theme was emphasized in correspondence, incorporated in the Senate Report, from the Attorney General and Acting Secretary of State. The Attorney General's letter stated that the bill would "authorize the refusal of visas to aliens whose *entry* into the United States would endanger the public safety," and further noted that "[t]he purpose of the legislation is to provide means not now afforded by law of keeping out of this country certain aliens, otherwise admissible, whose *presence* in the United States would be dangerous to the public safety." *Id.* at 1-2 (emphasis added). The State Department's letter similarly described the bill as "authorizing the refusal of visas to aliens whose *admission* into the United States would endanger the public safety." *Id.* at 2 (emphasis added). Likewise, the chief sponsor of the bill explained that it would "authorize the refusal of visas to aliens whose *admission* into the United States would endanger the public safety" and that it "merely permits the consuls to refuse visas to aliens whom they know or have reason to believe are persons whose *presence* in the United States will be inimical to the public interest." 87 Cong. Rec. 4757 (1941) (remarks of Senator Russell) (emphasis added).

Against this legislative backdrop, the court of appeals nevertheless stated that the legislative history "tugs in more than one direction" (Pet. App. 17a). Yet, the only opposing pull cited by the court is a reference to prejudicial "activities" in the Conference Report accompanying the 1950 Act. See Pet. App. 17a n.10 (quoting H.R. Conf. Rep. 3112, 81st Cong., 2d Sess. 54 (1950)). And, as explained by Judge Bork (Pet. App. 42a), that discussion merely repeats verbatim the words of Section 22 and does not purport to explain what those words mean.

3. While we thus believe that a common sense reading of the statute and its legislative history suffices to resolve the "entry/presence" issue, there is in any event nothing in the statutory language or history to suggest that the State Department's resolution of the issue is impermissible or unreasonable. Accordingly, since the Department of State is the agency charged with issuing visas under the Immigration Act, its interpretation is entitled to judicial deference. *Chevron,* 467 U.S. at 842-845. Indeed, the demand for deference is heightened here because the question at issue implicates "the conduct of foreign relations" which is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952) (footnote omitted). See also *Regan* v. *Wald*, 468 U.S. 222, 242 (1984) (discussing the "classical deference to the political branches in matters of foreign policy"). The authority to exclude aliens is "inherent in sovereignty" (*Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972) (quotation marks omitted)) and "intricately interwoven" with the conduct of foreign policy (*Harisiades* v. *Shaughnessy*, 342 U.S. at 588). This authority "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950) (citations omitted). The courts should, therefore, "hesitate long before limiting or embarrassing such powers." *MacKenzie* v. *Hare*, 239 U.S. 299, 311 (1915).

4. And, finally, even if evidence of administrative practice were needed to decide the "entry/presence" issue, the court of appeals' remand was unnecessary. As we have noted (pages 12-13 n.8, 14, *supra*), both the panel majority and Judge Bork recognized that the exclusion policy stated in the State Department Manual and a specific past exclusion support the government's reading of Subsection 27. See Pet. App. 19a-21a; *id.* at 44a-45a n.2. Although the

court of appeals relied on *Kent* v. *Dulles*, 357 U.S. 116 (1958), to find these examples inadequate (Pet. App. 21a-22a), "[i]t would turn *Kent* on its head to say that simply because we have had only a few situations involving conduct such as that in this record, the Executive lacks the authority to deal with the problem when it is encountered." *Haig* v. *Agee*, 453 U.S. 280, 303 (1981) (footnote omitted). The examples cited by the court of appeals and the dissent, and those listed in the next paragraph, certainly "suffice[] [to show] that the Executive has 'openly asserted' the power at issue" (*ibid.*, quoting *Zemel* v. *Rusk*, 381 U.S. 1, 9 (1965)).

The Office of Legal Counsel of the Department of Justice (OLC) has noted in a published opinion that in 1968 the State Department excluded certain Rhodesians because of concerns not with "any specific activities in which they would engage while here, but [with] the serious adverse foreign policy consequences of allowing them to be present in violation of Security Council Resolution 253." 1 Op. Off. Legal Counsel 64, 70 (1977). Relying, inter alia, on a discussion of legislative history that parallels Judge Bork's (*id.* at 71-72), and a review of materials from the files of the State Department and INS (*id.* at 72-73), OLC concluded that such an exclusion was "based on a reasonable administrative interpretation of [Subsection 27]" (*id.* at 71), and accordingly endorsed a similar exclusion in 1977. See 8 U.S.C. 1103(a) (vesting authoritative executive interpretation of the Act in the Attorney General). The Rhodesian incidents illustrate the consistency—and utility—from Administration to Administration of the government's interpretation of Subsection 27. Indeed, this point was made to Congress in a letter from Joan M. Clark, Assistant Secretary of State for Consular Affairs (*Exclusion and Deportation Amendments of 1983: Hearing on H.R. 4509 and H.R. 5227 Before the Subcomm. on Immigration, Refugees, and International Law*

of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 197 (1984) (emphasis added)):

> [U]nder all administrations since at least 1959, there have been cases in which nonimmigrant visas have been refused under [Subsection 27] on the ground that the alien's *entry or* proposed activities could have potentially serious adverse foreign relations consequences. Such determinations have been made by this and previous administrations in light of the foreign relations issues of concern at the time, the government's position on the issue, the alien's relationship to the issue, and the potential impact of the alien's *entry or* proposed activities on the government's position.

B. Subsection 27 Authorizes Exclusion For Reasons Which Are In Addition To The Alien's Association With Subsection 28 Organizations

The court of appeals held that the government's use of Subsection 27 in these cases "nullifie[d]" and "evade[d]" the restrictions placed by the McGovern Amendment on the use of Subsection 28 (Pet. App. 22a). To prevent this claimed result, the court would require the government to process visa applicants under Subsection 28, rather than Subsection 27, unless the reason for exclusion is not only in addition to, but independent of, the fact of membership in a Subsection 28 organization (*id.* at 24a). But here again, the statute's language, structure, and legislative history, and the Executive's past administration of the Act, all contradict the court's interpretation. That interpretation, moreover, would create serious anomalies and is inconsistent with this Court's approach to overlapping provisions of the Immigration Act. Finally, the State Department's interpretation is once again at least a reasonable one, and is entitled to deference.

1. The McGovern Amendment, enacted in 1977, simply provides that "the Secretary of State should * * * recommend that the Attorney General grant" a waiver of Subsection 28 excludibility in order to allow temporary admission of an alien who would otherwise be denied a visa "by reason of" membership in a Subsection 28 organization. As explained by Judge Bork, the purpose of the Amendment was to put an end to "the statutorily-required blanket exclusion of virtually all people who were or had been affiliated in some way with [a Subsection 28] organization" (Pet. App. 48a-49a).[11] The Amendment, however, is narrowly circumscribed. It applies only to applicants who are "otherwise admissible," and was amended in 1978 to make clear that it does not apply to "any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization."

We submit that the natural reading of "other than" is "in addition to," rather than "independent of." Thus, where the membership in a Subsection 28 organization raises concerns beyond that of membership per se—such as when the particular organization is connected with a foreign government and the alien's entry therefore will create foreign policy problems—Subsection 27 may properly be invoked. The alien's membership in the Subsection 28 organization is no longer the sole ground for exclusion: in the words of the statute, the "alien * * * is excludible for reasons other than membership in or affiliation with a proscribed organization."

It is, accordingly, quite clear that the visa denials in these cases do not come within the Amendment's ambit. As noted by Judge Bork, the denials were based not on the

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[11] More broadly, the statute's stated purpose was to "achiev[e] greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe [the 1975 Helsinki Accords]," and to "encourag[e] other signatory countries to comply with those provisions." 22 U.S.C. 2691(a).

aliens' memberships in proscribed organizations, but on their affiliations with foreign governments—governments whose relationships with the United States have been "marked with tension" (Pet. App. 52a). Thus, as Under Secretary Eagleburger attested, Tomas Borge was excluded because he "intended to travel * * * *in his official capacity*" as one of the highest-ranking leaders of the Nicaraguan government (*id.* at 86a (emphasis in original)); Olga Finlay and Leonor Rodriguez Lezcano were excluded because they "intended to travel * * * not as private Cuban citizens, but rather as official representatives of the Cuban Government" (*id.* at 90a); and Nino Pasti was excluded because of his active membership in the World Peace Council, an organization "controlled and financed by the USSR" (*id.* at 92a). And in each case the particularized foreign policy problems raised by their proposed visits were noted as well.[12]

2. Congress and the Executive have consistently interpreted the McGovern Amendment to mean just what it says—namely, that it does not apply when an alien is excludible under a category of the Act other than Subsection 28. Indeed, the Conference Report discussing the Amendment states that its provisions affect only those who are excludible "*solely* because of membership in or affiliation with a proscribed organization" (H.R. Conf. Rep. 95-537, 95th Cong., 1st Sess. 31 (1977) (emphasis added)).[13] Thus, it was clear from the outset that if there are reasons "in addition to" membership, then membership is not the "sole"

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[12] That the particular circumstances were considered and the exclusions not reflexively made is further demonstrated by the fact that, in earlier circumstances, three of the four aliens involved here had been granted admission (Pet. App. 28a, 67a n.2; J.A. 92-93). Furthermore, one of the excluded aliens was granted a visa subsequent to the application denied here (J.A. 93).

[13] See also S. Rep. 95-842, 95th Cong., 2d Sess. 16-17 (1978) ("any possibility that a prospective visitor might pose a threat of any kind to U.S. security continues to be a valid reason for exclusion").

reason, even if those additional reasons are not "independent of" membership.[14]

This understanding was underscored in hearings conducted in April 1979 by the Commission on Security and Cooperation in Europe, an investigative body created by Congress (Pub. L. No. 94-304, 90 Stat. 661) for the purpose of monitoring compliance with the Helsinki Accords.[15] As the Assistant Secretary of State for Consular Affairs stated to the Commission:

> [T]he [McGovern Amendment] does not apply to applicants ineligible on grounds other than, *or in addition to,* mere organization membership. An applicant who seeks to enter the United States "solely, principally or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States" is ineligible under Section 212(a)(27) of the Act *regardless* of whether he is also ineligible under Section 212((a)(28) by reason of organization membership.

Basket Three: Implementation of the Helsinki Accords: Hearings Before the Commission on Security and

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[14] Significantly, the legislative history of the original Amendment apparently offers only two examples of the kinds of persons to whom the McGovern Amendment would apply: Eurocommunist leaders and communist labor leaders. See S. Rep. 95-194, 95th Cong., 1st Sess. 13, 32 (1977); see also S. Rep. 95-842, 95th Cong., 2d Sess. 16 (1978). As Judge Bork pointed out (Pet. App. 53a), the inclusion of these categories in no way forbids honoring "a specific Executive concern over admitting a particular person associated with a foreign government that the Executive considers in some respects adversarial to ours." Indeed, Congress made this clear when it amended the McGovern Amendment in 1979 (see pages 28-31, *infra*).

[15] The Commission, as required by Pub. L. No. 94-304, 90 Stat. 661, is composed of 15 members, including six from the Senate, six from the House, and one each from the Departments of State, Defense, and Commerce.

Cooperation in Europe, 96th Cong., 1st Sess. 50 (1979) (emphasis added) [hereinafter cited as *Helsinki Hearings*].

Similarly, the Associate Attorney General explained to the Commission that "[a]ssuming a visa applicant is in fact ineligible for admission to this country because he or she meets the criteria of either paragraphs (27) or (29), there is simply no call to trigger the mechanism set forth in the McGovern amendment." *Helsinki Hearings* 20.

The same point was also made in a colloquy between the Chairman of the Commission, Representative Fascell, and another Commission witness, Hume Horan, the Deputy Assistant Secretary of State for Consular Affairs, where each agreed that the government's interpretation here of the interplay between Subsection 27 and the McGovern Amendment is correct:

> Mr. HORAN. * * * The McGovern amendment, in effect, requires that the Secretary of State recommend that the Attorney General grant a waiver under the authority of section 212([d])(3)(a) of the act for any nonimmigrant applicants ineligible for a visa solely—and I stress the word "solely"—by reason of membership in a proscribed organization unless the applicant's admission would be contrary to the security interest of the United States.
>
> Chairman FASCELL. In other words, if a person would be excludable under paragraphs (27) and (29), then he couldn't be admitted under (28)?
>
> Mr. HORAN. Exactly. That is an important point.
>
> Chairman FASCELL. With or without the McGovern amendment.
>
> Mr. HORAN. Mr Chairman, that is the point we often make.
>
> Chairman FASCELL. Yes, I know. But some people just can't seem to grasp that point. So we have to keep making it over and over again. * * *

> Mr. HORAN. We should emphasize that the law does not apply to applicants ineligible on grounds other than, *or in addition to,* their organization membership. An applicant who seeks to enter for other such reasons is ineligible and excludable under sections 212(a)(27) and 212(a)(29) of the act.

Helsinki Hearings 39 (emphasis added).

The validity of this construction was confirmed when, four months after the Commission held its hearings, a provision was added to the McGovern Amendment to make clear that it does not apply to "representatives of purported labor organizations in countries *where such organizations are in fact instruments of a totalitarian state*" (see 22 U.S.C. 2691(b) (emphasis added)). Representative Solarz, the co-sponsor of this provision, explained that it is designed to insure the exclusion of

> so-called leaders of purported labor unions in the Soviet Union and in other Communist countries of Eastern Europe, who, whatever else they may be, cannot be considered genuine representatives of workers but are, rather, representatives of the state.

125 Cong. Rec. 8345 (1979). In responding to questions on the House floor, Representative Solarz stressed that the new provision simply clarifies that the McGovern Amendment, as originally enacted, was never intended to provide a haven for such aliens:

> Mr. FASCELL. Mr. Chairman, I just want to say to [Representative Solarz], with respect to this [addition to the McGovern Amendment], it certainly was not the intention of the original language, which this amendment seeks to amend, to authorize in any way, directly or indirectly, the admission into the United States of any individual who is excludable under present law.
>
> The gentleman agrees with that statement, does he not?

> Mr. SOLARZ. Mr. Chairman, I fully agree with the gentleman that that was not the intent of the original language.

Ibid. Thus, as noted by Judge Bork (Pet. App. 54a), while the Solarz provision specifically concerns only labor leaders, it reflects a broader understanding regarding the limits of the McGovern Amendment: that representatives of foreign governments who are otherwise excludible may be denied visas notwithstanding their affiliation with Subsection 28 organizations. The "virtually conclusive" significance of such an enactment, approving an established administrative construction of the statute being amended, has often been stressed by this Court. See, *e.g.*, *CFTC* v. *Schor,* No. 85-621 (July 7, 1986), slip op. 12, and cases there cited.

3. The court of appeals' interpretation not only ignores the language and history of the McGovern Amendment, it would create anomalous results. As the panel apparently acknowledged (Pet. App. 27a n.21), its ruling confers a *favored* entry status for those who are members of Subsection 28 organizations—a result that would effectively stand that subsection on its head. See *id.* at 56a-57a (Bork, J., dissenting); cf. *Reid* v. *INS,* 420 U.S. 619, 628-629 (1975). The purpose of the Amendment was not to effect a "change in overall U.S. policy toward Communism." S. Rep. 95-842, 95th Cong., 2d Sess. 16 (1978). Indeed, the court's ruling would require the Executive to ignore an established affiliation between a particular Subsection 28 organization and a particular foreign government, no matter how close the nexus between them may be. In the *Cronin* v. *Shultz* case, for example, the court has refused to permit the government to conclude that Nino Pasti is an undisclosed agent of the Soviet Union based on his membership in the World Peace Council. Yet, as we have noted, the State Department has determined that the World Peace Council is an instrumentality

of the Soviet Union. See page 10, *supra*. As one Department document concluded, the World Peace Council has a "preponderance of Soviet and pro-Soviet personnel in [its] key * * * leadership and decision-making positions"; "the bulk of its expenses are met by the Soviet Union"; and it "operate[s] however Soviet foreign policy interests dictate" (Dep't of State, *Foreign Affairs Note: World Peace Council: Instrument of Soviet Foreign Policy* (Apr. 1982), *reprinted in* J.A. 64-65, 66, 71). There is simply no basis for the court of appeals' assumption that Congress intended in the McGovern Amendment to have the Executive close its eyes to such an alter ego relationship.

4. The court of appeals' approach in interpreting the McGovern Amendment is also contrary to *Reid* v. *INS*, *supra*, where this Court construed a similar waiver provision under the deportation sections of the Act. *Reid* involved the interplay between Section 241(a)(1), 8 U.S.C. 1251(a)(1), which requires deportation of aliens excludible at the time of entry, and Section 241(a)(2), 8 U.S.C. 1251(a)(2), which requires deportation of aliens who entered the United States without inspection. Unlike the second provision, Section 241(a)(1) was subject to mandatory waiver for certain aliens who were initially excludible because they had obtained entry by fraud. Like the McGovern Amendment, however, this waiver applied only to aliens who were "otherwise admissible." The petitioners in *Reid* had entered the United States by misrepresenting themselves to be United States citizens—conduct which fell within the Section 241(a)(1) waiver. The government, however, brought deportation proceedings under the nonwaivable provision of Section 241(a)(2). Finding that the petitioners' misrepresentation also fell within this "separate ground," the Court held that the government's reliance on Section 241(a)(2) was not—as the court of appeals here suggests—an "evasion," but rather was fully consistent with statutory authority. 420 U.S. at 622-623.

Similarly, the government is not here precluded from basing its exclusion decisions on the "separate ground" of Subsection 27 just because the facts of these cases also present some overlap with Subsection 28 (compare *Reid,* 420 U.S. at 622-623); the fact that the aliens belong to Subsection 28 organizations cannot immunize them from the operation of other provisions of the Act (compare *id.* at 628-629). As Judge Greene noted, "subsection (27) is a much more closely targeted, narrow provision than is subsection (28)," and "unlike subsection (28), * * * [it] does not authorize waivers at all" (Pet. App. 74a-75a). See also *Castro-Guerrero* v. *INS,* 515 F.2d 615 (5th Cir. 1975); *In re Diaz,* 15 I. & N. Dec. 488 (B.I.A. 1975).

5. Finally, the State Department's interpretation of the relationship between Subsection 27 and the McGovern Amendment is plainly not unreasonable, and is entitled to deference—especially in this foreign policy context—under *Chevron* and the other authorities we have discussed.[16]

C. The Court Of Appeals' Decision Impermissibly Intrudes Into The Executive's Conduct Of Foreign Policy

The court of appeals' remand order further demonstrates that its reading of the Immigration Act is incorrect, and the order is improperly intrusive independently of that error. In *Kleindienst* v. *Mandel,* 408 U.S. at 770, this Court specifically instructed the lower courts not to "look behind" the "facially legitimate and bona fide reason[s]" offered by the Executive for exclusion of aliens. Such an inquiry, the Court explained, would bring the judiciary into an area committed " 'exclusively [to] the political branches of government' " (*id.* at 765). Accord, *e.g., Mathews* v. *Diaz,* 426 U.S. 67, 81 (1976);

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[16]The court of appeals apparently held that even its interpretation of the McGovern Amendment was satisfied in the case of Tomas Borge (Pet. App. 29a n.23).

Shaughnessy v. *Mezei*, 345 U.S. 206, 210 (1953); *Harisiades* v. *Shaughnessy*, 342 U.S. at 589 (footnote omitted) (matters regarding aliens "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").[17] Yet the court of appeals' construction of Subsection 27 and the McGovern Amendment has caused it to embark on precisely that inquiry and interference. On the "entry/presence" issue, the court has demanded that the government "come forward with further examples of the exercise or assertion of power to exclude under subsection (27) on the basis of presence alone," and indeed requires that respondents be given "sufficient discovery to contest those examples and provide counter-examples" (Pet. App. 21a-22a (footnote omitted)). On the McGovern Amendment issue, the court requires further analysis of whether the visa applicants "have governmental affiliations independent of their membership in subsection (28) organizations" (see, *e.g.*, *id.* at 29a n.23). See also *id.* at 30a-32a.

Respondents have, indeed, already taken the court's remand on the administrative practice issue as an invitation to discover the rationale underlying prior Subsection 27 exclusions. For example, in one discovery request, plaintiffs ask the Department of State to "describe the facts which formed the basis" for "every instance from January 1, 1970 to the present in which a visa was denied pursuant to" Subsection 27. Plaintiffs' First Set of Interrogatories

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[17] While this principle was developed in the context of rejection of constitutional claims, it obviously serves *a fortiori* as a guide to statutory construction in this field. Cf. *Kleindienst* v. *Mandel*, 408 U.S. at 753-754; *Doherty* v. *Meese*, No. 86-2335 (2d Cir Dec. 23, 1986), slip op. 817 (footnote omitted) (because Section 243(a) of the Act, 8 U.S.C. 1253(a), vests the attorney general with broad discretion, and because his decision to reject an alien's designation of a country of deportation is a political one involving the conduct of foreign affairs, that decision is "essentially unreviewable").

and Document Requests, para. 12(a) (C.A. App. A66).[18] See also, *e.g.*, *id.* at A180 (para. 4 of Declaration of Charles S. Sims (plaintiffs' co-counsel), discussing the wide discovery needed); Br. in Opp. 15. Presumably, because the court of appeals' order allows plaintiffs to "contest" the examples produced by the government, plaintiffs will claim that they are entitled to cross-examine government officials regarding the reasons behind each example offered—a result fundamentally inconsistent with the Executive's exclusive discretion in this area. Cf. Pet. App. 54a-55a n.5 (Bork, J., dissenting) ("requiring the Executive to justify a pattern of visa grants and denials would force the Department of State either to discuss highly sensitive matters in a public forum or to forego its authority to deny many visas").

On the McGovern Amendment issue, plaintiffs are likely to seize upon the court of appeals' remand order as authority to dispute any government determination that the visa applicants (independent of their organizational ties) are affiliated with foreign states. See Pet. App. 51a-52a n.4. Indeed, the court of appeals itself posed just such a dispute in the case of Leonor Rodriguez Lezcano. The court stated that it did "not now comprehend any basis for claiming that [Lezcano has] governmental affiliations independent of [her] membership in subsection (28) organizations" (Pet. App. 29a n.23). The court's conclusion, however, cannot be reconciled with Under Secretary Eagleburger's finding that "[t]he official, governmental nature of [both Lezcano's and Olga Finlay's] proposed trip was clearly manifested both by the issuance to the two women of Cuban diplomatic passports and by the submission of their applications through diplomatic channels" (J.A. 61). By reviewing—and indeed rejecting—the Under

[18] This discovery request was originally served on December 30, 1983, and was revived following the court of appeals' remand order. The district court has stayed all discovery pending this Court's review on certiorari.

Secretary's finding, the court of appeals engaged in an exercise which could not be "further outside the bounds of judicial competence, or more intrusive with respect to the conduct of foreign affairs" (see Pet. App. 52a n.4 (Bork, J., dissenting)).

It is vitally important that there be unambiguous recognition of the authority of the Department of State to exclude aliens whose presence or entry will impede its conduct of foreign affairs. As we have discussed (pages 6-8, *supra*), Subsection 27 is used sparingly and with special care and, when it is used, it is only because there are "significant diplomatic or foreign policy ramifications" at stake (J.A. 57-58). The court of appeals has, therefore, greatly weakened an important tool of foreign policy, and "deprived [the Executive] of much of the flexibility and nuance that are essential in the conduct of foreign relations" (Pet. App. 60a (Bork, J., dissenting)). Nor should the Department of State be required to disregard the fact that the entry of a particular alien can have diplomatic repercussions, or the reality that some organizations are controlled by foreign governments. If the court of appeals' decision were allowed to stand, it would accordingly not only enmesh the courts in questions outside the bounds of judicial competence, it would cast a chill over Executive decisionmaking and impair the conduct of foreign policy.

Thus, the error of the court's reading of the statutes here is further demonstrated by the unsupportable result to which it has led: unseemly inquiry by plaintiffs and courts into the Executive's foreign affairs decisionmaking, and substantial hindrance of its conduct of foreign affairs.[19]

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[19] Respondents' principal constitutional complaint is that the visa denials deprived them of their First Amendment rights to hear and speak with their invitees. Under *Kleindienst* v. *Mandel*, 408 U.S. at 770, such a complaint cannot survive when the reason for the denials is "facially legitimate and bona fide." As we have shown (pages 8-11, 26-27, *supra*), the aliens here were excluded because of their affilia-

tions with hostile foreign regimes—a reason which even the court of appeals majority recognized as legitimate under Subsection 27 (Pet. App. 26a-27a). Accordingly, as Judge Bork and Judge Greene—the two judges who reached the constitutional issue—concluded (*id.* at 60a-64a, 80a), there can be no doubt that this reason satisfies the *Kleindienst* test.

Similarly without merit is respondents' argument that Subsection 27 is an overbroad delegation of legislative authority. In its delegations of power in the area of foreign relations, Congress "must of necessity paint with a brush broader than that it customarily wields in domestic areas" (*Zemel* v. *Rusk*, 381 U.S. at 17). This Court therefore long ago rejected the very sort of separation of powers argument raised by plaintiffs here. See *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-544 (1950) (rejecting separation of powers attack against 55 Stat. 252, a predecessor of the current Immigration Act). The argument has no greater strength today. See also Pet. App. 63a (Bork, J., dissenting).

Although respondents' constitutional claims were not reached by the court of appeals' majority, this Court clearly has discretion to consider them in the course of reviewing the court of appeals' judgment. Since the issues were "squarely presented and fully briefed" (*Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980)) in both courts below, and present this Court with "purely legal question[s]" (*Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985)) that are controlled by clear and consistent precedent, those claims should be rejected at this time. To remand the issues would ill serve "the interests of judicial administration" (*Carlson* v. *Green*, 446 U.S. at 17 n.2). See also *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 n.15 (1981); *Vance* v. *Terrazas*, 444 U.S. 252, 258-259 n.5 (1980).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, *et al.*, *Petitioners,*

—v.—

JAMES ABOUREZK, *et al.*, *Respondents.*

GEORGE P. SHULTZ, *et al.*, *Petitioners,*

—v.—

CITY OF NEW YORK, *et al.*, *Respondents.*

GEORGE P. SHULTZ, *et al.*, *Petitioners,*

—v.—

BRUCE CRONIN, *et al.*, *Respondents.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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INTRODUCTION

The issue in this case is whether § 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), authorizes the exclusion of foreign speakers from the United States based on their political affiliations or the anticipated content of their political speech before American audiences.

By their very nature, such ideological exclusions call into question our national commitment to the principle "that debate on public issues should be uninhibited, robust and wide-open . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). At a minimum, therefore, they cannot be sustained absent clear evidence of congressional intent. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Because such evidence is lacking in this record, the decision below should be affirmed.

THE STATUTORY FRAMEWORK

Section 212 of the Immigration and Nationality Act defines 33 categories of excludable aliens. Section 212(a)(27), the provision most directly at issue here, bars the admission of any alien "who seek[s] to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Its proscriptions are absolute and cannot be waived.

Section 212(a)(28), 8 U.S.C. § 1182(a)(28), bars aliens who advocate communism or are affiliated with communist organizations. Unlike (a)(27), its provisions can be waived by the Attorney General. 8 U.S.C. § 1182(d)(3). Indeed, in 1977, Congress adopted the so-called McGovern Amendment, 22 U.S.C. § 2691, which states that the Secretary of State "should" recommend a waiver in (a)(28) cases unless Congress is formally notified that national security is at stake.

Section 212(a)(29) of the Act, 8 U.S.C. § 1182(a)(29), requires the exclusion of any alien likely to engage in espionage, sabotage, or acts calculated to achieve the forcible

overthrow of the United States government. It, too, cannot be waived.

STATEMENT OF THE CASE

The proceedings in this Court represent a consolidation of three separate actions in the district court. Although litigated and decided together, each arose in a unique factual context as described below.

A. *Shultz v. Cronin*

The question of nuclear disarmament is, without doubt, one of the most vital issues facing the country today. On October 23, 1983, two respondents in this action—the New England Campaign to Stop the Euromissiles and Mobilization for Survival—planned a rally in Boston to protest the placement of American Pershing missiles in Europe. The rally was scheduled to coincide with similar demonstrations here and abroad.

Nino Pasti was an invited speaker at that rally. Mr. Pasti is an acknowledged expert on nuclear weapons and nuclear disarmament. He developed that expertise as a four star general in the Italian Air Force and as the Italian Military Representative to the NATO Military Committee. From 1963-66, Mr. Pasti was stationed at the Pentagon and worked with the United States Defense Department on a wide range of military issues. In 1966, Mr. Pasti became Vice-Supreme Allied Commander in Europe for Nuclear Affairs. He left the military in 1969 upon reaching the mandatory retirement age. From 1976-83, Mr. Pasti served as a member of the Italian Senate. He is currently president of an Italian organization named Struggle for Peace ("Lotte per la Pace"), and editor of its monthly magazine entitled Struggle for Peace and Disarmament ("Lotte per la Pace et il Disarme"). J.A. 104-5.

Mr. Pasti has frequently travelled to the United States and has received at least five previous visas from the United States government. On or about September 8, 1983, he applied to the American Embassy in Rome for a visa to attend and speak at the disarmament rally in Boston on October 23. J.A. 105-6.

After questioning Mr. Pasti about his political associations, the consular officer initially determined that Mr. Pasti was excludable from the United States under (a)(28). Following State Department procedure, a telex was then sent to Washington regarding a possible waiver. In response, the State Department directed Mr. Pasti's exclusion under (a)(27). Pet. App. 5a.

At the time, Mr. Pasti was not given any explanation for his exclusion other than a statutory citation to (a)(27). Subsequently, the State Department revealed its concern that, if admitted to the United States, Mr. Pasti would speak out against the deployment of American missiles in Europe and thereby further the propaganda aims of the Soviet Union during "a particularly delicate period for United States foreign policy." Pet. App. 94a. The government reached this conclusion based on Mr. Pasti's membership in the World Peace Council (WPC). Pet. App. 92a-93a. Indeed, the State Department decided in 1982 to prohibit all members of the WPC from entering the United States "except in limited circumstances," Pet. App. 93a, because of its conclusion that the WPC is "controlled and financed" by the Soviet Union. Pet. App. 92a. Mr. Pasti was apparently excluded pursuant to that general policy.[1]

Mr. Pasti's inability to obtain an American visa deprived the sponsors of the Boston disarmament rally and those who attended it from hearing the informed views of a respected critic of American nuclear policy. Respondents remain anxious to meet with him whenever he can obtain the necessary visa. Mr. Pasti, in turn, has informed respondents of his willingness to accept their invitation whenever the United States government permits him to travel to America. J.A. 106.

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1 The explanation for Pasti's exclusion is contained in an affidavit by Lawrence S. Eagleburger, then Under Secretary of State for Political Affairs, which was initially reviewed *in camera* by the district court. Pet. App. 78a-80a. After the Court of Appeals expressed its "grave concern" with this procedure, Pet. App. 30a-32a, the Eagleburger affidavits were declassified in all three cases (with two minor exceptions) and provided to respondents. Brief for Petitioners at 6 n.3.

B. *Reagan v. Abourezk*

The policies pursued by the current administration toward the government of Nicaragua have been a major source of public controversy in the United States for the past several years. That controversy is ongoing.

In the fall of 1983, a group of Americans anxious to learn more about events in Central America generally, and Nicaragua specifically, invited Tomas Borge, Nicaragua's Interior Minister, to come to the United States for a five day speaking tour. Despite different backgrounds, perspectives and interests, each of the inviters shares a common goal—the wish to meet face-to-face with a person whose knowledge and experience of Central American affairs cannot be disputed.

For example, Mr. Borge was invited to Washington by Congressmen Edwards and Schumer, who hoped to gain a perspective on Nicaragua from Mr. Borge that was not readily available from domestic sources.[2] Mr. Borge was also invited to meet with a variety of professors, journalists, businessmen and community leaders throughout the United States.

Having accepted these invitations, Mr. Borge applied for a non-immigrant visa on or about November 15, 1983. He informed the United States Embassy in Managua that he intended to visit the United States in December, and that the purpose of his trip was to engage in the speaking tour that had been arranged for him by the respondents in this case. J.A. 95.

Only a few months earlier, Mr. Borge had been told by American government officials that he would be granted a visa to enter the United States for a speaking tour. *Id.* Nevertheless, when he actually applied for a visa in November 1983, his request was denied under § 212(a)(27). J.A. 90.

Neither Mr. Borge nor any of the respondents was ever officially informed of the reason for the visa denial. However, Secretary of State Shultz was quoted as saying that while he ordinarily favored freedom of speech, "it can get abused by

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2 At the time the complaint was filed in *Abourezk*, two other plaintiffs were serving in Congress: Paul Tsongas in the Senate and James Shannon in the House of Representatives.

people who do not wish us well."[3] In a similar vein, an unnamed White House official stated that "the government did not want to give Mr. Borge a propaganda platform in the United States."[4] This theme was amplified by Under Secretary of State Eagleburger who stated that the admission of Mr. Borge would have sent a "wrong message" to our allies and "could have" affected the Contadora negotiations concerning Nicaragua depending on the nature of Mr. Borge's comments in the United States. Pet. App. 87a.[5]

Because the question of American policy toward Nicaragua remains very much alive on the national agenda, each of the respondents has expressed an ongoing desire to meet with Mr. Borge whenever possible.

C. *Shultz v. City of New York*

The Commission on the Status of Women was established by New York City in 1975 as a forum on women's issues. Pursuant to its mandate, the Commission invited Olga Finlay and Leonor Rodriguez Lezcano to New York in September 1983. Ms. Lezcano is an expert on the status of black women in Cuba. J.A. 101-2. Ms. Finlay is an attorney who has written extensively on family law issues. J.A. 101-2. Both women are members of the Federation of Cuban Women. *Id.*

The invitation extended to Ms. Finlay and Ms. Lezcano by the New York City Commission was part of a larger speaking tour. Ms. Finlay and Ms. Lezcano were also invited to speak at a series of universities and public meetings across the country. Shortly after receiving these invitations, Ms. Finlay and Ms. Lezcano applied to the United States Interest Section in Havana for an American visa. On their applications, they indicated the general purpose of their visit and that they intended to remain in the United States for only a brief stay. Their applications were denied pursuant to § 212(a)(27). J.A. 92.

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3 *Washington Post*, December 3, 1983, at A12.

4 *The New York Times*, November 30, 1983, at A11.

5 *See* n.1, *supra*.

Ms. Lezcano has travelled to the United States on one prior occasion. J.A. 102. Ms. Finlay lived in the United States for fifteen years as a child. Since she returned to Cuba in 1961, she has been in the United States on numerous occasions to attend conferences and fulfill speaking engagements. Prior to the events that led to this case, she was never informed by United States officials that her presence in the United States was prejudicial to the public interest. J.A. 98.[6]

Concerned about the inability of Ms. Finlay and Ms. Lezcano to obtain visas from the United States government, various respondents, including the Institute for Policy Studies and Thomas Holloway of Cornell University, sought an explanation from the State Department. In response to their inquiries, they were informed that the decision had been based upon a determination that the proposed visit of Finlay and Lezcano to engage in a speaking tour "would have been prejudicial to the public interest by providing these two officials with forums for propagating Cuban policies before United States audiences." The State Department added that any future applications by the two women "will be considered in light of the intended purpose of their visit," noting that "visits which are primarily for sport or cultural purposes are exempted" from the restrictions that apparently apply to speaking tours.[7]

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6 In December 1983, Ms. Finlay was granted a visa to attend a meeting of the Pan American Health Organization in Washington, D.C. Because this visa was granted only a few months after Ms. Finlay's prior application was denied, the government has suggested that the visa denial challenged in this case had little impact and was not content-related. The government fails to mention the visa restrictions imposed on the December 1983 trip. Specifically, Ms. Finlay was advised that she was not permitted to leave the Washington area for any purpose, and that she could only participate in the single meeting for which her visa was issued. Accordingly, Ms. Finlay was obliged to decline a renewed invitation to speak at the Institute for Policy Studies, and was unable even to meet with respondents' counsel to discuss the present action. J.A. 99.

7 Letter from Kenneth W. Skoug, Jr. to Thomas H. Holloway, attached to the Declaration of Thomas H. Holloway (C.A. App. A239).

The now-declassified Eagleburger affidavit[8] is not appreciably more specific. After noting that the Federation of Cuban Women is headed by a Cuban Communist Party official, it notes that the Cuban government "routinely employs people *like* Finlay and Lezcano" to encourage Americans "to accept a positive image of the Cuban Revolution and Cuban society." Pet. App. 89a-90a (emphasis added). The affidavit does not say that Ms. Finlay and Ms. Lezcano were *in fact* employed for this purpose in September 1983 or that the government even believed that to be their purpose in travelling to this country.[9]

The speaking tour planned for Ms. Finlay and Ms. Lezcano was, of course, cancelled when they were barred from entering the United States. The damage caused to debate and discussion within the United States by that cancellation is described in respondents' declarations. As explained, for example, by Thomas Holloway, director of Cornell's Latin American Studies program:[10]

> Given the particular backgrounds and expertise of these two women, a presentation by them in person, followed by discussion and dialogue with members of the Cornell community, is essential to the purpose of our visiting speakers program. Under our standard procedures and guidelines, in keeping with the principles of academic freedom, exchange of ideas, and open debate, learning of the views of these speakers through impersonal means is an inadequate substitute for face-to-face contact. Speakers are not invited to deliver information to a passive audience, but to raise issues for discussion. Such a purpose can only be fulfilled by bringing speakers and audiences together in direct, personal contact.

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8 *See* n.1, *supra*.

9 The government also fails to note that an immigration court recently rejected its contention that the Federation of Cuban Women is an arm of the Cuban government. *See In re Margaret Jo Randall*, No. A11 644 708 (Executive Office for Immigration Review, Aug. 28, 1986). A copy of this decision has been lodged with the Clerk for this Court's convenience.

10 C.A. App. A237.

Each of the respondents has suffered a similar loss, although each did not necessarily wish to discuss precisely the same issues with Ms. Finlay and Ms. Lezcano. For example, David Rudstein, a law professor, dean, and expert on criminal justice, looked forward to a discussion about the rights of juveniles and blacks in the Cuban legal system. Those subjects are not adequately described in the available literature. More importantly, as Dean Rudstein notes, "a Socratic dialogue with a piece of paper cannot take place."[11]

The invitations to Ms. Finlay and Ms. Lezcano remain open. Both women are anxious to speak in the United States as soon as our government will permit them. J.A. 100, 103.

D. The District Court

The complaints in this case were filed in December 1983. On March 1, 1984, the government moved to dismiss or, in the alternative, for summary judgment. Following an oral argument at which government counsel claimed that the executive branch could, if it wished, exclude foreign speakers for the purpose of limiting public debate within the United States,[12] the district court issued its decision on July 27, 1984. Pet. App. 65a-80a.

The government's threshhold claims were rejected by the district court, which found jurisdiction and standing. *Id.* at 70a. It also found that the case was not moot. Citing this Court's decision in *Kolender v. Lawson*, 461 U.S. 352 (1983), the district court ruled that "in view of the government's broad defense of its actions, [respondents] have every reason to fear that the allegedly unlawful activity will continue." *Id.* at 71a.

Turning to the merits, the district court acknowledged that respondents' statutory arguments were "not unpersuasive." *Id.* at 72a. Specifically, the district court agreed that the government's actions in this case could not be upheld if the language of § 212(a)(27) were read on "a strictly textual basis." *Id.* The district court declined to adopt a "textual" interpretation, however. Instead, the district court held that Congress must

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11 C.A. App. A272-73.

12 Transcript of district court proceedings, dated July 2, 1984, at 58-60.

have intended (a)(27) to be applied more broadly than it was written. The district court therefore held that (a)(27) could be applied in this case, despite the lack of a finding by either the district court or the government that any of the excluded foreign speakers was likely to engage in prejudicial "activities" if admitted to the United States.[13]

E. The Court of Appeals

On appeal, a divided panel reversed and remanded for further proceedings in the district court. Pet. App. 1a-64a.[14] The majority opinion rests on two related but distinct holdings.

First, the court ruled that the government had not established on the present record that the statutory reference in (a)(27) to prejudicial "activities" was meant to apply to an alien whose "entry" or "presence" in the United States was deemed prejudicial by government officials. In reaching this conclusion, the majority began with the language of the statute itself, noting that the "specific reference to activities would be superfluous, indeed, misleading, if entry or presence alone could justify exclusion." *Id.* at 16a. As the majority observed, "the plain thrust of the language of subsection (27) . . . weigh[s] heavily against the government's reading." *Id.*

In addition, the majority noted that the language of (a)(27) is reinforced by the context in which it appears. Specifically, the 33 categories of exclusion set forth in § 212(a) of the Act distinguish between exclusions based on status and exclusions based on conduct. Judged in those terms, the majority concluded that (a)(27) must be regarded as conduct-based, espe-

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13 The district court also held that "an alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded under subsection (27) solely on account of the content of his proposed message." *Id.* at 77a. The district court was persuaded, however, by its *in camera* review of the Eagleburger affidavits that the government had acted in this case for content-neutral reasons. *Id.* at 80a. The inherent unfairness of this *ex parte* procedure was strongly noted by the Circuit Court. *See* n.1, *supra.*

14 The panel unanimously affirmed the district court's ruling on jurisdiction, standing and mootness. Pet. App. 8a-13a, 35a. Petitioners do not seek review of those rulings in this Court.

cially when juxtaposed against the status-based language of (a)(28). Applying traditional principles of statutory construction, the majority ruled that this distinction was significant. "Congress' undoubted ability to draft categories based only on status, when that is the legislature's intention, strengthens the inference that the words 'to engage in activities' contained in subsection (27) were not put there inadvertently." *Id.* at 16a-17a.

The majority next examined the legislative history and found that "it tugs in more than one direction." *Id.* at 17a. Likewise, the majority concluded that the "meager evidence" offered by the government of its past practice under (a)(27) was insufficient to "demonstrate the kind of consistent administrative interpretation necessary to give rise to a presumption of congressional acquiescence." *Id.* at 21a. Rather than reject the government's interpretation outright, however, the majority remanded to permit the government to offer additional evidence on this point. *Id.* at 22a. The government chose not to take advantage of that opportunity and instead has petitioned directly to this Court.

The decision below also rested on the majority's interpretation of the McGovern Amendment and the light it sheds on the statutory relationship between (a)(27) and (a)(28). Recognizing that the McGovern Amendment was adopted by Congress to restrict exclusions based solely on political affiliation, the majority noted that "[i]f the government could use subsection (27) to exclude aliens whose entry might threaten our foreign policy objectives simply because of their membership in Communist organizations, then subsection (28) would be made superfluous and the congressional will expressed in the McGovern Amendment will be nullified." *Id.* at 23a. Thus, the majority held that even if (a)(27) embraces entry or presence, its invocation must still be based on something other than an alien's membership in an organization proscribed by (a)(28) and correspondingly covered by the McGovern Amendment. Pet. App. 24a.

The majority expressed this thought by stating that an alien's exclusion under (a)(27) must be based on some reason "independent of" organizational membership under (a)(28). *Id.*

However, the essence of its holding is that the finding of prejudice required by (a)(27) must be based on specific information about a specific individual and not premised on a notion of guilt by association with a proscribed organization. On this ground, as well, the majority remanded for further clarification of the government's position.[15]

Judge Bork dissented. Although agreeing that "[h]ad we nothing before us but the language of the statute . . . I might be inclined to adopt the construction proposed by [respondents]," *id.* at 42a, his opinion concludes that the legislative history of (a)(27) and its predecessor statutes demonstrates a congressional intention to bar aliens whose entry or presence in the United States might be deemed prejudicial even in the absence of any reason to believe that they will, in fact, engage in prejudicial activities. *Id.* at 38a.

Likewise, Judge Bork agreed with the majority that (a)(27) and (a)(28) must be read together and that the McGovern Amendment must be given effect. *Id.* at 53a. He further agreed that the McGovern Amendment prohibits exclusions based on a "generalized . . . distrust of communist organizations, and that (a)(27) cannot be used to circumvent that prohibition." *Id.* Unlike the majority, however, he concluded that the government's allegations in this case were consistent with the terms of the McGovern Amendment and thus could be upheld. *Id.* at 50a-52a.[16]

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15 Given its statutory ruling, the majority expressly declined to reach respondents' constitutional claims. *Id.* at 30a.

16 In further contrast to the majority, Judge Bork reached and rejected respondents' constitutional claims. *Id.* at 60a-63a.

SUMMARY OF ARGUMENT

The decision to bar a foreign speaker from the United States for ideological reasons necessarily "implicate[s]" core First Amendment values. *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). This is especially so when the government openly acknowledges its desire to avoid granting "legitimacy" to "hostile" political viewpoints by denying American visas to representatives or spokesmen of opposing political views.

Precisely because the constitutional issues raised by this case are so significant, and made more so by the virtually unlimited reach of the government's claimed authority, the statutory language relied on by the government to justify its actions must be closely scrutinized to respect congressional intent, avoid unnecessary constitutional adjudication, *see Tennessee Valley Authority v. Ashwander*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring), and forestall unintended infringements of First Amendment freedoms, *see Kent v. Dulles*, 357 U.S. 116 (1958).

Here, the plain language, statutory context, legislative history and contemporaneous administrative construction of § 212(a)(27) all point to a single conclusion. In enacting (a)(27), Congress was concerned about avoiding the likelihood of prejudicial "activities" within the United States by foreign visitors. The statute does not, therefore, authorize a denial based on a speaker's lawful political views or a foreigner's mere presence in the United States to express those views.

Nor may a finding of prejudice under (a)(27) be based on generalized assumptions about a speaker's political associations. Even assuming that "entry" or "presence" are appropriate criteria under (a)(27), the perceived prejudice flowing from entry or presence cannot be based on considerations of status more appropriately addressed under (a)(28). Otherwise, the safeguards embodied in the McGovern Amendment, 22 U.S.C. § 2691, will be effectively nullified and the congressional effort to ensure

greater "compliance" with the Helsinki Accords will have been frustrated by administrative action.

Finally, the additional inquiry into congressional intent contemplated by the Court of Appeals will not, as the government erroneously asserts, thrust the judiciary into sensitive foreign policy judgments. The terms of the remand are narrowly focused on two legal questions, which need not ever be reached if this Court agrees that the government's interpretation of (a)(27) is plainly incorrect on the present record.

First, the government has been asked to provide further evidence of past administrative practice under (a)(27) to support its claim of congressional acquiescence in what even Judge Bork concedes is a strained construction of the statutory language. Having initiated this process itself, the government is hardly in a position to complain about its fair completion.

Second, the district court has been directed to reexamine the government's proffered explanation for the visa denials in this case in light of the McGovern Amendment, and to determine whether those denials were based on anything more than the principle of guilt by association rejected by Congress when it adopted the McGovern Amendment. No further discovery is necessary to accomplish this quintessential judicial task.

ARGUMENT

I. THE VISA DENIALS CHALLENGED IN THIS CASE CANNOT BE JUSTIFIED UNDER § 212(a)(27) ABSENT ANY ALLEGATION THAT THE EXCLUDED FOREIGN SPEAKERS ARE LIKELY TO ENGAGE IN PREJUDICIAL "ACTIVITIES" IF ADMITTED TO THE UNITED STATES

Given the obvious and significant constitutional implications of the present controversy, it is important to define as precisely as possible the narrow statutory question raised by this case. The issue before this Court is not whether "the entry of [these]

particular alien[s] at this particular time would prejudice the foreign policy interests of the United States," as the government asserts in its affidavits. Rather the issue is whether a visa denial based on that judgment was authorized by Congress when it enacted § 212(a)(27) of the Immigration and Nationality Act. *See INS v. Cardoza-Fonseca*, ____ U.S. ____, 55 U.S.L.W. 4313 (March 9, 1987).

The government merges these very separate inquiries in its brief by arguing that (a)(27) cannot possibly mean what it quite clearly says or else it would be impossible to deal with the kind of situation created when the late Shah of Iran sought admission to the United States. This process of legislative reconstruction through a worst case scenario is wrong for two reasons. First, it ignores the fact that the potential problems foreseen by the government can be handled under other provisions of the Immigration and Nationality Act without distorting the meaning of § 212(a)(27). Second, and more fundamentally, it is not the role of the courts or the executive branch to rewrite an Act of Congress in order to make it work better or more efficiently. If there are flaws in the statute, they are for Congress to correct.

Applying traditional methods of statutory construction, the interpretation of § 212(a)(27) urged by the government cannot be sustained. As demonstrated below, it is an interpretation unmoored in text, history, context or past administrative practice.

A. Plain Language Of The Statute

This Court has often emphasized that questions of statutory construction "must begin with the language of the statute itself." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *INS v. Cardoza-Fonseca*, 55 U.S.L.W. at 4316. Indeed, "[a]bsent a *clearly expressed* legislative interpretation to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980) (emphasis added); *INS v. Cardoza-Fonseca*, 55 U.S.L.W. at 4316 n.12.

The language of § 212(a)(27) is admittedly broad, but not all encompassing. It renders ineligible for an American visa, any alien

> who the consular officer or the Attorney General knows or has reason to believe seeks to enter the United States solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States.

The government has never alleged in this case that any of the excluded foreign speakers seeks to enter the United States to engage in prejudicial "activities" of any sort, and the record plainly demonstrates that they do not. Instead, the government has argued that the mere "entry" or "presence" of these foreign speakers in the United States might prejudice American interests.

The distinction between "entry" or "presence," on the one hand, and "activities," on the other, is hardly a subtle one. That is especially so once it becomes apparent, as it has in this case, that the "entry" or "presence" of a foreign speaker in the United States is opposed by the government because of the speaker's political beliefs or associations. There is no more fundamental distinction in American constitutional law than the distinction between beliefs and activities. *E.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949). Had Congress intended § 212(a)(27) to extend beyond prejudicial "activities" to authorize exclusion on the basis of belief or status, it would have done so explicitly, as it did in enacting § 212(a)(28).

For understandable reasons, the government's brief largely ignores the language of the statute on which it purports to rely. In its single reference to the statutory language, the government argues that the distinction between presence and activities is essentially meaningless since "any person admitted to this country must engage in some activity . . ." Brief for Petitioners at 20. The statute, however, is not triggered by *any* activity. It refers only to activities that are "prejudicial to the public

interest, or endanger the welfare, safety, or security of the United States." Thus, the fact that a foreign visitor is likely to engage in a series of innocent activities while in this country—including eating, sleeping and travelling—does not establish a violation of (a)(27). As this Court recently stressed, the "ordinary and obvious meaning of the [statutory language] is not to be lightly discounted." *INS v. Cardoza-Fonseca*, 55 U.S.L.W. at 4316.

The government also overlooks Congress' use of the active verb "to engage." One engages in activities; one does not engage in the act of being present. The language of (a)(27) is therefore reinforced by its grammatical structure. *Id.* (noting the relevance of "linguistic" principles to statutory analysis). Because neither the language nor structure of (a)(27) supports the government's claim, the government attempts in effect to rewrite the statute. That responsibility belongs to Congress, however, not to the executive branch. *Cf. INS v. Chadha*, 462 U.S. 919 (1983).

After reviewing the language of (a)(27), the district court acknowledged that "[o]n a strictly textual basis, [respondents'] contention is not unpersuasive, for the statutory provision mentions only 'activities.' " Pet. App. at 72a. Similarly, the majority below observed that "[t]he specific reference to activities would be superfluous, indeed, misleading, if entry or presence alone would justify exclusion." Pet. App. at 16a. Judge Bork, as well, noted that "the language of the statute itself, which uses the term 'activities' . . . provides the most persuasive support for the [respondents'] position." *Id.* at 42a. In fact, respondents' statutory argument is irrebuttable.

B. Statutory Context

Section 212(a)(27) does not stand on its own. It is part of a comprehensive legislative scheme designed to identify aliens who are inadmissible to the United States. This context reinforces the significance of the word "activities" in the plain language of (a)(27). *See Erlenbaugh v. United States*, 409 U.S. 239, 241 (1972) ("individual sections of a single statute should be construed together").

Broadly stated, the 33 categories contained in § 212 can be divided into status-based exclusions and conduct-based exclusions. Some examples of the former include the exclusion of aliens who are "insane" or aliens who are drug addicts. 8 U.S.C. §§ 1182(a)(2) and (5). Examples of the latter include the exclusion of aliens who are coming to the United States to engage in prostitution or other immoral sexual acts. 8 U.S.C. §§ 1182(a)(12) and (13).

Of particular relevance here, § 212(a)(28) is clearly a status-based exclusion. The inadmissibility of anarchists and communists under (a)(28) does not depend on the potential commission of any acts within the United States. Anarchists and communists are excludable under (a)(28) because of who they are and regardless of what they do. By contrast, (a)(27) and (a)(29) are conduct-based exclusions. They do not depend on the alien's identity but on the alien's actions.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 55 U.S.L.W. at 4316, quoting *Russello v. United States*, 464 U.S. 16, 23 (1983). By reading the words "entry" and "presence" into (a)(27), petitioners lose sight of this important principle.

The government refers in its brief to "the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973) (citations omitted).[17] But its adherence to the rule is curiously selective. Thus, the government is untroubled by the fact that its construction of (a)(27) both ignores critical language and overlaps (a)(28). At the same time, it argues that (a)(27) implausibly duplicates (a)(29) unless it embraces entry and presence.[18]

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17 Brief for Petitioners at 20.

18 *Id.*

The relationship between (a)(27) and (a)(29) is not nearly as obtuse as the government suggests. Both refer to activities; however, the reference in (a)(27) is general and the reference in (a)(29) is specific. In other words, (a)(29) is a statute that deals primarily with espionage and sabotage. Other activities that may be prejudicial to the public interest but do not fit as neatly within our criminal law categories fall under (a)(27). For example, the government relied on (a)(27) when it sought to exclude a Libyan student who was studying aircraft maintenance in the United States. *El-Werfalli v. Smith*, 547 F.Supp. 152 (S.D.N.Y. 1982). His activities could not be classified as espionage or sabotage but they were prejudicial nonetheless to American interests. Section 212(a)(27) applies in these instances. Fairly read, it complements (a)(29). As distorted by the government, it nullifies the restrictions placed on (a)(28) by the McGovern Amendment.

C. Legislative History

The government's effort to buttress its interpretation of (a)(27) through selective quotations from the legislative history does not withstand scrutiny. Placed in proper context, even the government's excerpted statements support the view that the enactment of (a)(27) was prompted by a congressional concern with prejudicial *activities* and, more specifically, with prejudicial activities by foreign visitors who enter the United States under diplomatic cover. At most, it can be said that the legislative history "tugs in more than one direction." Pet. App. 17a.

The existence of legislative ambiguity, however, does not aid the government's cause. Given the use of the word "activities" in (a)(27), and the ordinary meaning normally given to that word, the government must demonstrate "clear evidence" that Congress intended to exclude foreign speakers from the United States under (a)(27) even in the absence of any reason to believe that the excluded foreign speakers are likely to engage in prejudicial "activities" if admitted to this country. *See Consumer Product Safety Commission v. GTE Sylvania, su-*

pra; INS v. Cardoza-Fonseca, supra. The government not only fails to meet that burden, it fails even to acknowledge it.

The legislative history of (a)(27) itself is sparse and unilluminating. Its language is taken almost verbatim from Section 22(1) of the Internal Security Act of 1950, Pub. L. No. 831, 64 Stat. 987, 1006,[19] and Congress offered little explanation for its action beyond its desire to "incorporate" the provisions of this predecessor statute. S. Rep. No. 1137, 82d Cong., 2d Sess. 10 (1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 30 (1952). The parties therefore agree that the history of the 1950 Act is relevant to the issue now before this Court. The parties disagree sharply, however, on what that history reveals.

The government bases its case entirely on the use of the word "entry" in two Senate reports accompanying the 1950 Act. Brief for Petitioners at 21. The government neglects to provide the context in which the word "entry" appears. Specifically, the passage cited by the government reads in full, as follows:

> Under existing law, among the excludable aliens are certain aliens who seek to enter the United States whose entry would be prejudicial to the public interest or would endanger the safety of the United States. The committee has broadened the class of excludable aliens who seek to enter the United States to engage in activities which would endanger the welfare of the United States.

S. Rep. No. 2230, 81st Cong., 2d Sess. 5 (1950).[20]

The government singles out the word "entry" from the first sentence and "broaden" from the second sentence to build its argument that Congress intended to exclude aliens whose entry, standing alone and without reference to any anticipated activi-

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19 Section 22(1) of the Internal Security Act mandated the exclusion of "[a]liens who seek to enter the United States solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States." This language was retained in Section 212(a)(27) of the 1952 Immigration and Nationality Act with the addition of the word "security" to the final clause.

20 Precisely the same language appears in S. Rep. No. 2369, 81st Cong., 2d Sess. 10 (1950), also cited by the government. The reference to "existing law" refers primarily to the Act of June 20, 1941. *See* pp. 20-21, *supra*.

ties, would be prejudicial to the public interest. This argument collapses when the two sentences are read together. The "broaden[ing]" that took place in 1950 was the addition of the word "welfare" to the statutory language, not the elimination of the requirement for prejudicial activities. Once that is understood, it becomes clear that the aliens whose "entry" was barred by the 1950 Act were those aliens who sought entry to engage in activities prejudicial to the public interest, safety or welfare of the United States. *See also* H.R. Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950).

This interpretation is reinforced by the comments of Senator McCarran, who sponsored both the 1950 and 1952 Acts. Upon introducing § 22 of the Internal Security Act, Senator McCarran explained that the provision was designed "to provide for the exclusion and deportation of all aliens, irrespective of status, if they seek entry to engage or engage after entry in activities endangering the public safety." 96 Cong. Rec. 14179 (1950).

His specific concern, repeated over and over throughout the congressional debate, focused on those "in diplomatic status [who] seek to enter the United States to engage in or are caught engaging in espionage, sabotage, or other *overt acts* endangering the public safety." *Id.* (emphasis added). Under then existing law, such aliens could neither be excluded nor deported from the United States. Section 22 was designed to close that loophole. *Id.* at 14172-73, 14441-42, 14551-52. There is no indication in Senator McCarran's remarks, or in any other portion of the congressional debate, that § 22(1) of the Internal Security Act was intended to reach aliens who did not engage in "overt acts" endangering the public safety.

Moving backward in time, the government next seeks to find the "clear evidence" of congressional intent it requires in the legislative history surrounding passage of the Act of June 20, 1941. Pub. L. No. 113, 55 Stat. 251. Once again, however, the government's historical references are incomplete and misleading. Significantly, the government relegates the text of the 1941 Act to a footnote in its brief. Brief for Petitioners at 21 n.10. This is hardly surprising, since the 1941 Act, like the 1950 and

1952 Acts that followed, referred to "activities" in the United States.

It provided in relevant part:

> [W]henever any American diplomatic or consular officer knows or has reason to believe that any alien seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States, he shall refuse to issue to such alien any immigration visa . . . .

The Senate Report accompanying the bill was only two pages long. S. Rep. No. 386, 77th Cong., 1st Sess. (1941). As Judge Bork recognized below, the principal explanation for the bill was contained in a supporting letter submitted by the Attorney General. Pet. App. 41a. Like the government, however, Judge Bork only quotes part of the Attorney General's letter.

The letter indeed begins with a reference to the 1941 bill as one which authorizes visa denials for "aliens whose entry into the United States would endanger the public safety." S. Rep. No. 386, *supra*, at 1. But that summary description is more fully explained in a subsequent paragraph from the Attorney General's letter that neither the government nor dissent below cites. It states:

> The bill under consideration would authorize and empower consular and diplomatic officers of the United States to deny a visa or other travel document to an alien seeking admission into the United States if such officer knows or has reason to believe that the alien wishes to enter the United States for the purpose of engaging in activities which would endanger the public safety.

Id. at 2.

In 1948, Congress granted equivalent authority to immigration officers so that aliens who misrepresented their purpose in coming to the United States when interviewed abroad could, nonetheless, be stopped at the border. Act of May 25, 1948, Pub. L. No. 552, 62 Stat. 268. According to the Senate Report

accompanying the 1948 legislation, "[t]he purpose of this bill is to give the Attorney General the same power to exclude aliens who might be coming to the United States for the purpose of engaging in *activities* which would endanger the public safety as is presently vested in the Secretary of State . . ." S. Rep. No. 1199, 80th Cong., 2d Sess. 1 (1948) (emphasis added).

Likewise, a supporting letter from the Justice Deparment in 1948 describes the 1941 Act, upon which the petitioners so heavily rely, as one that permits the State Department to deny visa requests when it has "reason to believe that an alien seeks to enter the United States for the purpose of engaging in *activities* which will endanger the public safety . . ." H.R. Rep. No. 1286, 80th Cong., 2d Sess. 2 (1948) (emphasis added).

Finally, it is worth noting that the Senate Report accompanying the Internal Security Act of 1950 described the 1941 Act in similar terms. In the very process of building upon the 1941 Act, Congress specifically noted that it "grants to any American diplomatic or consular officer authority to refuse the issuance of a visa to any alien whom he knows or has reason to believe seeks to enter the United States for the purpose of engaging in *activities* that will endanger the public safety." S. Rep. No. 2230 at 19 (emphasis added).[21]

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21 On the eve of World War II, President Roosevelt issued a proclamation authorizing the exclusion of any alien whose "entry would be prejudicial to the interests of the United States . . . ." *See* Presidential Proclamation No. 2523, 6 Fed. Reg. 5821, 5822 (1941). At various times, the government has suggested that (a)(27) must be construed in light of this proclamation. Belatedly but wisely, the government has apparently abandoned that argument here. Roosevelt's proclamation was based on a statutory provision that expressly authorized restrictions on aliens during wartime "in addition to those otherwise provided by law." Act of June 21, 1941, Pub. L. No. 114, 55 Stat. 251, 252. This enactment would not have been necessary if Congress believed the same authority was conferred by the 1941 Act cited by the government. Moreover, the proclamation itself opens proclamation itself opens by referring to "the exigencies of the present international situation and [needs] of the national defense." There is no reason to suppose, and nothing in the legislative history to suggest, that Congress intended to extend this wartime measure when it adopted (a)(27). Significantly, Roosevelt's proclamation is not even mentioned in the survey of relevant immigration restrictions contained in the extensive Senate report on the Internal Security Act of 1950. S. Rep. No. 2230, *supra*, at 16-19.

Respondents readily concede that it is possible to find isolated references to "entry" or "presence" in the legislative history relevant to this case. The point of reviewing legislative history, however, is not to seek out isolated words but to determine congressional intent based on a fair reading of the full history. In virtually every instance in which the government has been able to locate the words "entry" or "presence" in the legislative history, Congress has gone on to explain, in the following sentence or paragraph, that its concern about entry or presence was tied to the likelihood that the excluded foreigner would engage in prejudicial activities if admitted to the country. By parsing the language, the government separates it from its context. Read in context, the legislative history offers little or no support for the government's claim that the reference to "activities" in the language of § 212(a)(27) should be disregarded by the courts as either inadvertent or meaningless.

D. Administrative Construction

Citing *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984), the government contends that this Court should defer to what it describes as an administrative practice applying (a)(27) on the basis of mere "entry" or "presence." That contention is flawed for two fundamental reasons. First, this Court has recently reaffirmed that issues of statutory construction remain committed to the judiciary, even after *Chevron*. *See INS v. Cardoza-Fonseca, supra*. Second, the record does not support the government's claim of a consistent administrative practice. To the contrary, the most contemporaneous and authoritative administrative interpretations of (a)(27) highlight the significance of the word "activities" in the statutory language.

This Court's decision in *Cardoza-Fonseca* is particularly instructive. The resolution of that case turned on an interpretation of the phrase "well-founded fear of persecution" in the Refugee Act of 1980, 8 U.S.C. § 1101(a)(42). The government asserted that an alien seeking asylum under the Act was required to show a clear probability of persecution. It further-

more contended that its interpretation of the statute was entitled to deference under *Chevron* as long as it was reasonable.

In an opinion joined by five members of the Court, Justice Stevens expressly rejected that approach. Referring to the government's claim that the asylum standard should coincide with the clear probability standard for withholding deportation, Justice Stevens wrote: "The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide." 55 U.S.L.W. at 4320. *Chevron*, the Court explained, is relevant to the "quite different . . . question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts." *Id.*

Here, the question of whether the word "activities" in § 212(a)(27) embraces "entry" or "presence" is akin to the question of statutory interpretation presented in *Cardoza-Fonseca* and reserved to the courts. The secondary question of whether particular foreign visitors are likely to engage in prejudicial activities if admitted to the United States is not presented by this record since the government has made no allegation of prejudicial activities in any of these cases apart from the concern over entry or presence.

The government's related claim that additional deference is due in foreign policy cases is also undercut by *Cardoza-Fonseca*. The decision to grant political asylum based on a well-founded fear of persecution in the country of origin has potential foreign policy consequences that are at least as severe as the decision to admit a foreign speaker for a lecture tour. *Cardoza-Fonseca* illustrates, however, the importance of distinguishing between the foreign policy consequences of a particular decision and the determination whether that decision is authorized by statute. Administrative judgments are entitled to deference in the former instance but not the latter.

As this Court explained last Term in *Japan Whaling Ass'n v. American Cetacean Society*, 106 S.Ct. 2860, 2866 (1986):

> We are cognizant of the interplay between these [statutes] and the conduct of the Nation's foreign relations, and we

> recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

In any event, the record in this case does not reveal a consistent administrative practice entitled to deference. Most importantly, the government's review of past administrative practice omits any mention of relevant decisions interpreting (a)(27) by the Justice Department's Board of Immigration Appeals. These decisions are entitled to significant weight, both because they are closer in time to passage of the 1952 Act than the State Department examples offered by the government and because Congress has specifically declared that rulings by the Attorney General "with respect to all questions of law [under the Act] shall be controlling" on the State Department. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 35 (1952). *See also* 8 U.S.C. § 1103(a).

As a specific example of this general principle, the above-cited House Report notes:

> [R]ulings which may be issued by the Attorney General relating to those provisions of the bill governing the admissibility of aliens will be controlling with respect to a determination of aliens who are admissible and will be binding on the Secretary of State with respect to determinations of whether an alien is eligible for a visa.

Id.

Matter of M—, 5 I. & N. Dec. 248 (BIA 1953), represents the earliest "controlling" ruling by the Attorney General on the meaning of (a)(27). The government in that case was rebuffed in its effort to exclude an English pacifist from the United States only one year after (a)(27) was adopted. The Board stressed that,

> [t]he unpopularity in the United States of the views advocated by a person seeking admission would appar-

> ently not be a test [under (a)(27)] as to whether admission of that person would be prejudicial to the public interest . . .

Id. at 252. The Board furthermore found that the alien's political views provided "no reason to believe that he will engage even incidentally in activities prejudicial to the public interest." *Id.* at 254. Absent such evidence, the Board ordered the government to issue a visa. *Id.*

Five years later, in *Matter of Zamora*, No. A-105 50 431, unreported (BIA March 11, 1958), the Board again rejected the government's reliance on (a)(27) to exclude a pacifist whose political views allegedly disagreed with American foreign policy objectives. In the intervening years, the Board has never retreated from its insistence on prejudicial activities under (a)(27).

Thus, in *Matter of McDonald and Brewster*, 15 I. & N. 203 (BIA 1975), the Board refused to apply (a)(27) to two aliens who were arrested for importing marijuana into the United States. Although the facts are distinguishable, the Board's reasoning applies with equal force to the ideological visa denials at issue in this case. The Board wrote:

> [S]ection 212(a)(27) was designed to exclude aliens who seek to enter solely, principally, or incidentally to engage in activities inimical to the internal security of the United States . . . While the importation for personal use of several marijuana cigarettes may be prohibited by law, it is not an activity which is inimical to the internal security of the United States.

Id. at 205.[22]

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22 In *Matter of Rivero-Diaz*, 12 I. & N. 475 (BIA 1967), the Board sustained an exclusion under (a)(27) upon a finding that the alien sought entry "solely, principally, or incidentally to engage in activity prejudicial to the public interest." *Id.* at 478. Respondents are unaware of any BIA decision upholding an (a)(27) exclusion based on the government's claim that the alien's entry or presence in the United States was prejudicial, without anything more.

The government's attempt to establish a consistent administrative interpretation of (a)(27) that embraces mere "entry" or "presence" rests on two documents. Brief for Petitioners at 23-24. First, the government refers to a series of illustrative examples under (a)(27) contained in the Foreign Affairs Manual prepared by the State Department for its consular officers. The government does not mention that these examples are introduced with a disclaimer that states: "It was the intent of Congress that the provisions of paragraph (27) of Section 212(a) of the Act be used to safeguard the safety of the United States. They must not be used as 'catch-all' provisions for refusing visas in cases which do not fit in other paragraphs of Section 212(a)." Foreign Affairs Manual, Pt. II, § 41.91(a)(27), reprinted in Gordon and Rosenfeld, 6 *Immigration Law and Procedure*, 32-214, 215 (1983).

Moreover, the four illustrative examples provided in the Foreign Affairs Manual hardly offer a ringing endorsement of the government's interpretation of (a)(27). They include aliens who might engage in conspiratorial activities against the United States while in the country, aliens who are known members of terrorist organizations, aliens associated with underworld criminal organizations, and alien officials who engaged in physical brutality while in political power. *Id.* It belabors the obvious to point out that none of these examples are even remotely relevant to the present case, nor has the government claimed such extreme provocation for its visa denials.

Furthermore, three of the examples clearly turn on the likelihood of prejudicial activities in the United States. Ignoring this, the government focuses exclusively on the final example in the Foreign Affairs Manual, which purportedly anticipates visa denials based solely on an alien's past activities. The government claims, in addition, that this interpretation of (a)(27) was applied in 1959 to exclude a former Nazi officer from the United States. Pet. App. 21a.

A single exclusion in 35 years under the Immigration Act does not establish a consistent administrative practice. And the fact that it concerns a former Nazi officer is significant. Congress has repeatedly indicated its special concern about

providing a haven for individuals who collaborated with the Nazi regime. *See* 8 U.S.C. § 1182(a)(33). The exclusion of a Nazi, therefore, says little or nothing about Congress' general attitude toward (a)(27).[23]

The government also relies on a 1977 opinion by the Office of Legal Counsel of the Department of Justice that upheld application of (a)(27) to six Rhodesians who sought to enter the United States to promote agricultural trade with Rhodesia by attending an international conference of agricultural producers in Washington, D.C. Brief for Petitioners at 24. The first half of the opinion characterizes the creation of business contacts and the making of deals within the United States as a prohibited activity under both (a)(27) and United Nations Security Council Resolution 253 (May 29, 1968).[24] 1 Op. Off. Legal Counsel 64, 66-70 (1977). The second half of the opinion does go on to state that (a)(27) can be triggered by mere entry, but it makes two critical concessions in that regard. First, it acknowledges, as it must, that the language of (a)(27) "speaks . . . of the nature of the activities in which the alien seeks to engage after entering the United States." *Id.* at 71. Second, it reports that past administrative practice under (a)(27) has not been nearly as consistent as the government now contends. According to the OLC opinion:

> The Department of State has suggested that some memoranda and correspondence from 1959 to 1962 relating to the efforts of a certain alien to enter the United States may demonstrate an administrative interpretation that an alien could not be excluded solely on the ground that the circumstances surrounding his entry render all subsequent

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23 In the proceedings below, the government cited two other examples of (a)(27) exclusions that were allegedly based on mere "entry" or "presence." However, as the Court of Appeals pointed out, the explanation for these visa denials actually pointed to the projected "activities" of the excluded aliens in the United States. Pet. App. 20a n.11.

24 Interestingly, the Security Council Resolution, in language reminiscent of (a)(27), barred "any *activity* . . . calculated to promote the export of any commodities to Southern Rhodesia" (emphasis added).

> activities "prejudicial to the public interest" or a danger to the security of the United States.

Id. at 72.

This historic view of the State Department is supported by a declaration in the record submitted by Leonard C. Meeker, who served as a legal advisor in the State Department for twenty-three years and as Chief Legal Advisor from 1965 to 1969. According to Mr. Meeker, "[s]ubsection 27 was understood during my service with the Department to be the basis for denying visas to aliens whose anticipated activities in the United States would create dangers to this country of a gravity comparable to espionage and sabotage."[25]

The Justice Department took a similar pre-litigation position on (a)(27). In a memorandum prepared only a few months prior to the commencement of this action, the Justice Department wrote: "The law as framed seems to permit findings of ineligibility under this section only as to persons whom we have reason to believe intend to engage in proscribed activities."[26]

At best, therefore, the government can offer only "scattered rulings . . . not consistently of one pattern," *Kent v. Dulles* 357 U.S. 116, 128 (1958), in support of its statutory interpretation of (a)(27). Under these circumstances, administrative deference is neither appropriate nor required. As this Court noted in *INS v. Cardoza-Fonseca*, 55 U.S.L.W. at 4320 n.30:

> An additional reason for rejecting the Government's request for heightened deference to its position is the inconsistency of the position [it] has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view. *Watt v. Alaska*, 451 U.S. 259, 273 (1981); see also *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

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25 C.A. App. A251-52.

26 Memorandum on Technology Transfers under the Immigration and Nationality Act, Department of Justice (March 1, 1982). C.A. App. A189.

Nor can the government redeem its statutory interpretation in the absence of evidence by arguing that it has been presented with few opportunities for applying (a)(27) since its enactment in 1952. *Cf. Haig v. Agee*, 453 U.S. 280, 303 (1981). By the government's own admission, 519 visa applications were denied under (a)(27) during the 20 year period from 1963 to 1983. Brief for Petitioners at 6 n.2. Other applications were certainly denied under (a)(27) before 1963 and after 1983. Nevertheless, the government offers this Court only one example of a vsia denial under (a)(27) based on mere "entry." Surely more is required to establish an administrative interpretation so clearly at odds with the language of the statute itself. For similar reasons, such a sparse record cannot support a claim of congressional acquiescence. *See Kent v. Dulles*, *supra*. Indeed, both the majority and dissent below agreed on this point. Pet. App. 21a, 46a.[27]

E. Case Law

Respondents are aware of two other decisions interpreting the scope of § 212(a)(27). *Allende v. Shultz*, 605 F.Supp. 1220 (D.Mass. 1985), is most closely on point. Plaintiffs in *Allende* challenged the government's refusal to grant a nonimmigrant visa to Hortensia de Allende, wife of the slain Chilean president. Ms. Allende had been invited to address a series of groups around the country "on issues of common concern." *Id.* at 1222. The government denied her visa under (a)(27) on the ground that she was a member of the World Peace Council and that her presence in the United States would be prejudicial to the public interest. *Id.*[28] The district court rejected the government's motion for summary judgment, holding that

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27 Because respondents were denied any discovery, there is no way of knowing whether the government's interpretation of (a)(27) is contradicted by other evidence in its own files, including evidence of contrary congressional intent or administrative practice. Thus far, the government has presented only the evidence it deemed helpful to its case. Even that one-sided presentation, however, is plainly insufficient.

28 This is precisely the same justification offered by the government for its refusal to grant Nino Pasti a visa in the present case.

Mrs. Allende's affiliation with the WPC was relevant to (a)(28) but not, "in itself, a 'facially legitimate and bona fide' reason for her exclusion under subsection (27)." *Id.* at 1225.

In *El-Werfalli v. Smith*, 547 F.Supp. 152 (S.D.N.Y. 1982), the district court upheld a visa denial under (a)(27). It did not rule that mere "entry" or "presence" is sufficient to trigger the statute. Rather, the court held that the United States government acted within its power under the statute in excluding a Libyan student whose purpose in entering the country was to learn to repair airplanes in a way that could later be useful to the Libyan Air Force. The exclusion, moreover, was pursuant to a consistent government policy "concerning the training of personnel able to aid the operation of Libyan aircraft." 547 F.Supp. at 154.

The distinction between *El-Werfalli* and this case is obvious. Obtaining specialized skills that can serve the military forces of a hostile government may well represent a prejudicial "activit[y]" within the meaning of (a)(27). It does not follow, however, that a foreign speaker discussing public issues of manifest importance to the American public is likewise engaged in a "prejudicial activity." The two situations are worlds apart in a constitutional democracy. It cannot be presumed that Congress forgot this distinction when it enacted (a)(27).

F. Congressional Intent

In the final analysis, the government's interpretation of (a)(27) does not rest on any of the traditional methods of statutory construction but rather on an administrative redrafting of the statutory language, which it ultimately justifies by the need to respond to a worst-case scenario.

Specifically, the government argues that a broad interpretation of (a)(27) is necessary to preserve the government's power to respond to situations like the one presented by the application of the late Shah of Iran to enter the United States for medical care after his fall from power. Brief for Petitioners at 20. As the district court noted: "The mere entry of the Shah into the United States and his presence in this country had the

most serious consequences for the United States . . ." Pet. App. 730.

That observation is incontestable. But it does not lead to the government's conclusion that Congress must have intended § 212(a)(27) to mean what it clearly does not say and what neither its legislative history nor administrative construction support—that "the distinction between an alien's activities and his presence in the United States is one without a difference." Brief for Petitioners at 20. *Cf. Dickman v. Commissioner of Internal Revenue*, 465 U.S. 330, 342 (1983) (rejecting statutory construction claim based on a "parade of horribles"); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 283-84 (1980).

An additional answer to the government's concern is that Congress conferred the necessary authority on the executive branch to deal with the Shah's application for admission, but not in (a)(27). As the Court of Appeals noted, Pet. App. 6a, n.2, that authority can be found in § 212(f) of the Act, 8 U.S.C. § 1182(f), which provides:

> Whenever the President finds that the entry of any aliens or class of aliens into the United States would be detrimental to the best interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

See Mow Sun Wong v. Campbell, 626 F.2d 739, 744 n.9 (9th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (holding that the President is empowered under § 212(f) "to prevent the entry of any alien or group of aliens . . .").

The use of the word "entry" in § 212(f) is particularly significant. It demonstrates, beyond doubt, that Congress knew how to distinguish between "entry" and "activities" when it drafted § 212. Contrary to the government's contention in this case, therefore, it must be assumed that Congress' use of the word "activities" in (a)(27) was both deliberate and meaningful.

The government also overlooks § 215 of the Immigration and Nationality Act, 8 U.S.C. § 1185(a)(1), which empowers the President to "prescribe" additional "limitations" on the entry of "any alien" into the United States. This specific authority was utilized by President Carter during the Iranian hostage crisis. *See* Executive Order 12172, 44 Fed. Reg. 67947 (1979), *amended by* Executive Order 12206, 45 Fed. Reg. 24101 (1980).[29]

In short, there is no reason or need to distort the plain meaning of (a)(27) in order to safeguard interests that Congress has already protected in other provisions of the Immigration and Nationality Act.

II. THE McGOVERN AMENDMENT PROHIBITS THE USE OF § 212(a)(27) TO EXCLUDE FOREIGN SPEAKERS BASED ON THEIR MEMBERSHIP IN PROSCRIBED ORGANIZATIONS

The McGovern Amendment was adopted by Congress in 1977 to "achiev[e] greater United States compliance" with the Helsinki Accords and to "encourag[e] other signatory countries to comply with [its] provisions." 22 U.S.C. § 2691(a). The Helsinki Accords are intended, *inter alia*, to "facilitate wider travel" across national borders. 22 U.S.C. § 2691(a).[30] Permitting the use of § 212(a)(27) to exclude foreign speakers on a theory of guilt by association with proscribed organizations would violate the letter and spirit of both the Helsinki Accords and the McGovern Amendment. Yet, that is precisely the argument made by the government in this case.

Unfortunately, the majority and dissenting opinions below became tangled in a linguistic squabble over whether the reasons for exclusion under (a)(27) must be "independent of,"

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29 In his dissent below, Judge Bork argues that the requirement of presidential involvement in both §§ 212(f) and 215 represents "diplomatic overkill." Pet. App. at 60a. In fact, it serves as a healthy guarantee that the First Amendment rights of American citizens will not be lightly cast aside in cases like this. *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976). By contrast, § 212(a)(27) can be triggered by any consular officer.

30 *See* Conference on Security and Co-operation in Europe: Final Act (Aug. 1, 1975), 14 I.L.M. 1292, 1314 (1975).

or may be "in addition to," the sort of organizational ties directly addressed by (a)(28). In and of itself, this semantic dispute is not particularly significant. What is significant is the underlying principle that an exclusion under (a)(27)—even assuming that (a)(27) reaches "entry" or "presence"—must rest on specific facts about a specific individual and cannot be based on a generalized inference drawn from organizational membership. On this key point, the majority and dissent agree. As Judge Bork explained: "The presumption that all members of [proscribed] groups, for that reason alone, ought to be excluded was rejected by the Congress that enacted the McGovern Amendment." Pet. App. 50a.

The government correctly points out that the McGovern Amendment does not mandate the admission of any alien. Its impact is nonetheless substantial. Prior to the Amendment, any alien affiliated with a communist organization was presumptively excludable under (a)(28). A waiver was available but it could be granted or denied at the unfettered discretion of the Attorney General. 8 U.S.C. § 212(d)(3). The McGovern Amendment alters the bureaucratic dynamic dramatically. Under its provisions, the Secretary of State must recommend a waiver of excludability for any alien denied admission because of organizational affiliation, or else certify to Congress that national security is at stake. 22 U.S.C. § 2691(a). The Attorney General may reject the Secretary of State's recommendation. But, as the Court of Appeals noted, he is unlikely to do so except in extraordinary circumstances. Pet. App. 28a, n.22.

In 1978, the McGovern Amendment was modified by Congress in response to the concern of "many Americans" that its terms had made it easier for terrorists to enter the country. S. Rep. No. 95-842, 95th Cong., 2d Sess. 17 (1978). Congress was understandably anxious to correct that misimpression. Accordingly, it stipulated that the McGovern Amendment should not "be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization." 22 U.S.C. § 2691(a).

The government seizes on this language to argue that the McGovern Amendment does not apply to an alien who is otherwise excludable under (a)(27). It is a circular argument that misses the point. No one contends that the McGovern Amendment applies to aliens who are properly excludable under (a)(27). The question is whether the government can circumvent the McGovern Amendment by using (a)(27) to exclude foreign speakers based on inferences drawn from their organizational memberships.

The relevance of the McGovern Amendment to the facts of this case cannot be seriously disputed. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969) ("subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"). As the State Department wrote in a 1983 letter to the Senate describing the certification process:[31]

> While the language of the McGovern Amendment does not, on its face, exclude from the term "security interests" foreign policy interests and considerations, the legislative history makes clear that this was the intent.

Thus, had the exclusions in this case proceeded under (a)(28), even the government agrees that the Secretary of State would have been required by the McGovern Amendment to recommend admission. Instead, the government resorted to (a)(27). This Court cannot approve such a transparent tactic to achieve an end run around the McGovern Amendment. *See Allende v. Shultz*, 605 F.Supp. at 1225 n.2.

The McGovern Amendment was introduced in the House by Representative Fascell, who began the debate by stating:

> We have the strength and wisdom to accommodate many visitors in this country even if a few do not share the

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31 Letter of Alvin Paul Drischler, Acting Ass't Secretary of State for Legislative and Intergovernmental Affairs to Vice President George Bush, in his capacity as President of the Senate, dated October 18, 1982, at 2. A copy of this letter, which is part of the record below, has been lodged with the Clerk of this Court.

> mainstream of American thought, as long as they are not here to throw bombs or to do harm to our citizens.

123 Cong. Rec. 26536 (1977).

He then assured the House that the McGovern Amendment did not restrict the legitimate authority of the executive branch to exclude specific individuals who truly threaten national security:

> There are those instances, and many of us know about them in detail, when there are very good reasons to deny entry to the United States to a person who presents a true danger through terrorism, because he is a committed anarchist, or he interprets his commitment to Communist ideology as a genuine license for destructive activities within our borders.

Id. See also S. Rep. No. 95-842, *supra*, at 17.

The allegations raised by the government in this case are fundamentally different in nature. They do not focus on the individual but rather on the organization to which the individual belongs. This is most apparent in the case of Nino Pasti, the former NATO general. The government charges that Mr. Pasti is a member of the World Peace Council, that the World Peace Council is "controlled and financed" by the Soviet Union, and that the Soviet Union had embarked on a propaganda campaign in the fall of 1983 to discourage deployment of American Pershing missiles in Western Europe. Pet. App. 92a-93a.

There is no claim in the government's affidavits that Nino Pasti was himself engaged in a propaganda campaign directed by the Soviet Union. To the contrary, the government asserts that he was excluded as part of a general policy to exclude all WPC members, "except in limited circumstances." *Id.* The government alleges in its brief that Mr. Pasti is an "undisclosed" agent of the Soviet Union. Brief for Petitioners at 31. But there is no indication in any of its affidavits that this allegation is based on anything more than Mr. Pasti's membership in the World Peace Council.

The government is similarly ambiguous in explaining its refusal to admit Ms. Finlay and Ms. Lezcano to the United States in September 1983. Again, however, the principal emphasis seems to be on their organizational affiliation rather than their individual characteristics or likelihood to engage in prejudicial activities. Thus, the Eagleburger affidavit begins by noting that both Ms. Finlay and Ms. Lezcano are officials of the Federation of Cuban Women (FMC). Pet. App. 89a. The government then claims that people "like" Ms. Finlay and Ms. Lezcano are "routinely" employed by the Cuban government to promote a positive image of Cuban society among American groups. *Id.* at 89a-90a. Neither in the Eagleburger affidavit or elsewhere, however, does the government suggest any reason to believe that Ms. Finlay and Ms. Lezcano were actually employed for that purpose in September 1983 or, indeed, at any other time.

Instead, the government switches gears and argues that Ms. Finlay and Ms. Lezcano were excluded in September 1983 because their visa applications were accompanied by a "diplomatic" passport and Cubans travelling on a diplomatic passport are, as a matter of policy, denied admission to the United States unless they are participating in the work of international organizations such as the United Nations, or engaged in bilateral discussions with the American government. *Id.* at 90a-91a. In fact, Ms. Finlay and Ms. Lezcano were travelling with a so-called "official" passport that is used by many non-diplomats, including artists and academics (J.A. 98-99; 102).[32] Thus, at the very least, there is reason to suspect that the actual

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32 If the government seriously believed that Ms. Finlay and Ms. Lezcano were Cuban officials and excludable for that reason, it would surely have made some reference in its brief to President Reagan's 1985 proclamation suspending the entry of Cuban officials into the United States. *See* Presidential Proclamation No. 5377, 50 Fed. Reg. 41329 (1985). One reason that it may not have mentioned the 1985 proclamation is that its effort to link the FMC with the Cuban government has already been rejected by at least one immigration judge. *See* n.9, *supra*.

As the Court of Appeals further noted, the fact that this proclamation was issued pursuant to § 212(f) of the Immigration and Nationality Act, 8 U.S.C. § 1182(f), supports respondents' contention that our national interest can be adequately protected without distorting the meaning of § 212(a)(27).

basis for the exclusion of Ms. Finlay and Ms. Lezcano rests where the government initially placed it—with their membership in the FMC, a proscribed organization under (a)(28) but not, without more, a basis for exclusion under (a)(27).

Upon reviewing this evidence, the Court of Appeals concluded that it did not "comprehend any basis for claiming that these two visa applicants have governmental affiliations independent of their membership in subsection (28) organizations." Pet. App. 29a, n.23. Likewise, the Court of Appeals observed that Mr. Pasti's exclusion appears to rest "solely and simply in [his] participation in the World Peace Council, an organization clearly covered by subsection (28) and the McGovern Amendment." *Id.* Finally, the Court of Appeals noted that Tomas Borge had previously been offered a visa to travel and speak within the United States despite his rank as Interior Minister of Nicaragua and that the government's basis for reversing that decision in November 1983 could not clearly be discerned from the submitted affidavits. *Id.* at 28a.

Beyond this failure of proof, the government's attempt to establish a link between the foreign speakers excluded in this case and hostile foreign governments reflects, once again, its fundamental misunderstanding of (a)(27). *See* Point I, *supra*. The threshold requirement of prejudicial "activities" in (a)(27) cannot be ignored even for foreign officials. If the government wishes to exclude foreign officials based on mere "entry" or "presence" it may use (a)(28) and comply with the McGovern Amendment, issue an appropriate proclamation under §§ 212(f) or 215, or petition Congress to enact a new exclusion provision. It may not rely on (a)(27), which simply does not confer the authority claimed by the government even on its reading of this factual record.[33]

The Court of Appeals accordingly remanded to the district court with instructions to reexamine the record in an effort to determine whether these particular foreign speakers were denied admission to the United States for reasons unique to them as individuals or for reasons precluded by the McGovern

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33 Of course, the government is under no obligation to meet with visiting dignitaries or extend them any official privileges. Indeed, the government is free to condemn their political views, if it so chooses.

Amendment—namely, their membership in mass organizations that our government believes are affiliated with a foreign communist party. *See* § 212(a)(28)(C).[34]

Echoing Judge Bork, the government objects to the majority's interpretation of the McGovern Amendment on the ground that it grants favored treatment to communist organizations. Brief for Petitioners at 31. Specifically, the government contends that since (a)(28) only reaches communist organizations, only communist party members are protected from exclusion under (a)(27) by the majority's view of the McGovern Amendment.

This reasoning is flawed on two grounds. First, Congress might easily have concluded that communist organizations require special protection under the McGovern Amendment precisely because (a)(28) has singled them out for *disfavored* treatment, as the Court of Appeals observed. Pet. App. 27a, n.21. Second, the decision below does not immunize communists from exclusion under (a)(27); it simply requires a nexus between the excluded individual (communist or not) and his projected *activities* in the United States. The McGovern Amendment takes exactly the same approach in requiring an individual certification to Congress whenever the Secretary of State recommends against a waiver of inadmissibility under (a)(28).

The government also objects to the terms of the remand on the ground that it will involve the courts in sensitive foreign policy judgments that they are not equipped to make. Brief for Petitioners at 33-36. It is an unpersuasive claim. As matters now stand, the district court has been directed to conduct two inquiries in this case.[35] The question of whether the word "activities" in (a)(27) permits exclusions based on "entry" or "presence" is a traditional question of statutory construction.

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34 It is worth emphasizing again that the government has not alleged that any of the excluded individuals in this case are likely to engage in prejudicial activities if admitted to the United States. Respondents are entitled to prevail on that basis alone. *See* Point I, *supra*.

35 Respondents have not opposed the limited remand ordered by the court below, although they believe that the present record is adequate to hold that (a)(27) was improperly applied to the facts of this case.

It can be resolved through judicial analysis and is appropriately within the judiciary's province. *See INS v. Cardoza-Fonseca, supra; Japan Whaling Ass'n v. American Cetacean Society, supra.* To the extent that it involves further examination of past administrative practice under (a)(27), the government itself has opened the door to that inquiry. Pet. App. 22a, n.15.[36]

The second question left open by the remand is whether the government's use of (a)(27) in this case is consistent with the McGovern Amendment. The government implies that this inquiry will place the courts in the position of second-guessing the foreign policy assessments of the State Department. This Court rejected a similar argument in *Cardoza-Fonseca, supra.* The decision below merely insists that the government's factual allegations reflect the congressionally-drawn lines of (a)(27). In that regard, the government has been offered a second opportunity to "reevaluate these visa denials without the statutory misinterpretation that casts doubt on their previous analyses." Pet. App. 30a. It is entitled to no more.

III. THE LANGUAGE OF § 212(a)(27) SHOULD BE NARROWLY CONSTRUED TO AVOID THE FIRST AMENDMENT PROBLEMS INHERENT IN THE GOVERNMENT'S BROAD APPLICATION OF THE STATUTE IN THIS CASE

The constitutionality of § 212(a)(27), as applied in this case, was not reached by the Court of Appeals. Pet. App. 30a, n.24. In a footnote, the government nonetheless asks this Court to decide that critically important question. Brief for Petitioners at 36 n.19. While agreeing that the question is important, respondents believe that the better course would be to permit the issue to be addressed in the first instance by the lower courts. Respondents submit, nonetheless, that the statutory

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36 In addition, the government can, where appropriate, invoke the state secrets privilege, *United States v. Reynolds*, 345 U.S. 1 (1953), as it has already done once in this case. The state secrets privilege, however, does not entitle the government to *rely* on information that it withholds from the adversary process.

construction of (a)(27) must take into account the constitutional problems raised by the government's broad view of the statutory language.[37]

This Court, of course, has never considered the constitutionality of (a)(27). Relying, however, on *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the dissent below argues, and petitioners presumably concur, that decisions to exclude foreign speakers under (a)(27) may be "based on the content of an applicant's political beliefs." Pet. App. 61a-62a. Nothing in *Kleindienst* justifies such a dramatic departure from traditional First Amendment doctrine.

The scope of the government's claim is illustrated by its assertion in the district court that (a)(27) authorizes the banning of foreign speakers for no other reason than the speaker's possible impact on domestic political debate.[38] That assertion was flatly rejected by the district court, which held that "an alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded under subsection (27) solely on account of the content of his proposed message." Pet. App. 77a. *Accord, Allende v. Shultz*, 605 F.Supp. at 1225.

Kleindienst challenged the government's right to deny a discretionary waiver of excludability to Dr. Ernest Mandel, a Belgian journalist and Marxist theoretician, who was concededly excludable under (a)(28).[39] Dr. Mandel brought suit along with six American professors who had either invited him to speak "or who expected to participate in colloquia with him," 408 U.S. at 759, alleging that the government's action was content-based in violation of the First Amendment. The government asserted, in response, that a waiver had been denied for content-neutral reasons; namely, that Dr. Mandel had violated the terms of his visa on a previous trip by engaging in fundraising activities that had not been authorized. *Id.* at 758.

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37 *See generally* Shapiro, "Ideological Exclusions: Closing the Border to Political Dissidents," 100 Harv.L.Rev. 930 (1987).

38 *See* n.12, *supra*.

39 *Klendienst*, therefore, did not present the question of statutory authority raised by this case.

Given this ideologically neutral explanation, the Court concluded that the government had satisfied its burden of providing a "facially legitimate and bona fide reason," which the courts would neither look behind nor balance "against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770. The Court did not address the constitutionality of (a)(28) itself, or its use by the government to limit speech in this country. To the contrary, the Court ended its opinion with a cautionary admonition that its decision was not meant to foreclose further consideration of the constitutional question that might be presented by a different record. *Id.*

At a minimum, there can be no doubt after *Kleindienst* that the First Amendment protects the right to receive information as well as the right to speak and, therefore, that the refusal to permit foreign speakers to enter this country necessarily affects the First Amendment rights of American inviters. *Kleindienst v. Mandel*, 408 U.S. at 762-63. *See also Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 757 (1976); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Lamont v. Postmaster General*, 381 U.S. 301 (1965).[40]

It is also clear that in any other context, the government's asserted right to make content-based judgments would be plainly unconstitutional, especially when motivated by a desire to shape domestic political debate in the government's favor. The principle that government may not discriminate among speakers for ideological reasons lies at the heart of the First Amendment. *Regan v. Time, Inc.*, 468 U.S. 641 (1984); *Carey v. Brown*, 447 U.S. 455 (1980); *Police Department v. Mosley*, 408 U.S. 92 (1972). As the Court said when reviewing the right of school officials to remove library books on ideological grounds: "If petitioners *intended* by their removal decisions to

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40 It does not follow, and respondents never claimed, that any American may secure the admission of any foreigner on First Amendment grounds. The government is free to enforce the immigration laws in a content-neutral fashion. What it may not do is use the immigration laws to structure the content of domestic political debate.

deny respondent access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." *Board of Education v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) (emphasis in original). Even more strongly, the *Pico* Court wrote: "Our Constitution does not permit the official suppression of ideas." *Id.*

A long and bitter history has proven that the risk of such censorship is unacceptably high when government officials are granted the power to license speech. Indeed, "[t]he struggle for freedom of [expression] was primarily directed against the licensor." *Lovell v. Griffin*, 303 U.S. 444, 451 (1938). As broadly construed by the government here, § 212(a)(27) is a classic licensing scheme. It is no different in scope or effect than numerous licensing schemes struck down by this Court over the past fifty years because of their impact on speech. *E.g., Hynes v. Mayor of Oradell*, 425 U.S. 610 (1980); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Niemotko v. Maryland*, 340 U.S. 258 (1951); *Thomas v. Collins*, 323 U.S. 516 (1945); *Largent v. Texas*, 318 U.S. 418 (1941); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939).

Nothing in *Kleindienst* suggests that the Court intended to legitimate content-based censorial judgments. Had the Court meant to reject this fundamental postulate of modern First Amendment law, or carve an exception whenever the national borders are involved, it is reasonable to assume that it would have done so expressly. This is especially true since *Kleindienst* was decided only *three days* after *Police Department v. Mosley*, 408 U.S. 92, 95 (1972), which held, in now classic language, that "above all else, the First Amendment means that

government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[41]

Properly read, *Kleindienst* is fully consistent with the Court's earlier ruling in *United States v. O'Brien*, 391 U.S. 376-77 (1968), affirming the government's right to punish the burning of a draft card, despite its symbolic aspect, because of the government's "legitimate" and non-ideological interest in maintaining the integrity of the Selective Service System. In both *Kleindienst* and *O'Brien*, the government's action was aimed at conduct, governed by content-neutral standards, and exercised only an "incidental" impact on speech.

Likewise, in *Regan v. Wald*, 468 U.S. 222 (1984), the Court upheld an executive ban on travel to Cuba in a manner entirely consistent with the *O'Brien* distinction between content-based regulations and regulations that have an incidental impact on the content of speech. Specifically, the Court recognized the right of the executive branch to restrict the flow of American currency to Cuba despite its "incidental" effect on the constitutional rights of Americans wishing to travel to that country. Here, the restraint on communication is direct and substantial.

Thus construed, *Kleindienst* does not support the government's claim that granting a visa to certain foreign speakers may send a wrong signal about American foreign policy. To the contrary, there is no ideological message conveyed by an American visa once it is clearly understood that visa decisions cannot be based on ideological grounds. For that reason, this Court has consistently rejected the notion that government can ban speech to avoid the possibility of being identified with it.

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41 The dissent below argues that First Amendment principles must give way in this case to the executive's authority over immigration policies. Pet. App. 61a. *Kleindienst* recognizes, however, that a program of ideological exclusions has important constitutional consequences for American citizens. The line of immigration decisions cited by the dissent, *e.g. Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), is therefore not controlling in this very different context.

See Widmar v. Vincent, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972).[42]

The district court accepted the validity of these First Amendment principles but held that the government's actions in this case were, in fact, content-neutral. Pet. App. 80a. That characterization was repeated by Judge Bork in his dissenting opinion. *Id.* at 62a. It is, at best, an odd and unacceptable notion of content-neutrality.

For example, it is clear from the government's own affidavit that Mr. Pasti's visa was denied because he was a known and credible opponent of American nuclear policy and "his proposed visit coincided with the initial deployment of Cruise and Pershing missiles in certain NATO countries—a particularly delicate period for United States foreign policy." *Id.* at 94a. The fact that the government describes Mr. Pasti's political views as congruent with Soviet propaganda aims, *id.*, does not alter its objection to the content of his anticipated message. By its own admission, the government's concern was that Mr. Pasti's speech, pejoratively labeled as "propaganda," would be favorably received by American audiences and thereby complicate implementation of the Administration's foreign policy objectives.

Similarly, the State Department indicated in a letter that Ms. Finlay and Ms. Lezcano might well have been admitted to the United States if they were coming to speak about sports rather than the status of women. *See* p. 6, *supra*. And the exclusion of Tomas Borge was apparently tied to the claim that one month earlier another Nicaraguan official had visited the

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42 Significantly, the McGovern Amendment was adopted, in part, "to open the way to visits by Eurocommunist leaders and to Communist labor leaders without the executive branch having to make the politically difficult individual decisions which might imply a change in overall U.S. policy." S. Rep. No. 95-194, 95th Cong., 1st Sess. 13 (1977).

In the circumstances of this particular case, it is difficult to conceive that anyone will mistakenly assume that American policy in Central America has suddenly shifted because a Nicaraguan representative is permitted to tour American colleges or that American resolve to place nuclear missiles in Europe has suddenly evaporated because Nino Pasti is permitted to address an American rally.

United States and "publicly advanc[ed]" a series of proposals that were opposed by our government. Pet. App. at 87a.

The use of (a)(27) to limit political debate in this country is inconsistent with core First Amendment values. *See Mills v. Alabama*, 384 U.S. 214, 218 (1966). To eliminate that conflict, the language of (a)(27) should be narrowly construed.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1987

RONALD W. REAGAN, ET AL., PETITIONERS

v.

JAMES ABOUREZK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

BRUCE CRONIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-656

RONALD W. REAGAN, ET AL., PETITIONERS

v.

JAMES ABOUREZK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

BRUCE CRONIN, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

In our opening brief, we showed that Subsection 27 of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(27), authorizes the exclusion of aliens whose entry or presence in the United States may compromise our foreign policy. We also showed that nothing in the McGovern Amendment precludes the State Department fro n using Subsection 27 to exclude aliens for reasons which are in addition to – even if they are not independent of – the aliens' association with Subsection 28 (8 U.S.C. 1182(a)(28)) organizations. Respondents' opposing

statutory analysis on these two points is unpersuasive. And while respondents attempt to bolster their analysis by raising the specter of First Amendment issues, their constitutional arguments have been rejected by the unmistakably "clear and consistent" precedent of this Court (Pet. App. 60a (Bork, J., dissenting)).

A.

1. Respondents' principal attack on the State Department's resolution of the entry/presence issue is that it allegedly ignores the "plain meaning" (Br. 33) of the word "activities" in Subsection 27. To the contrary, however, the State Department's position is simply that, "[a]s in all cases of statutory construction, [the] task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979).

As respondents no longer dispute,[1] one of Congress's purposes in enacting Subsection 27 (and its predecessors) was to ensure the exclusion of aliens who might damage United States foreign policy. This purpose is served only if the statute's reference to "activities" is read to "encompass[] entry and presence as well" (Pet. App. 42a (Bork, J., dissenting)). To do otherwise in these cases would preclude the exclusion under Subsection 27 of aliens whose very admission into this country – because of their relationship with particular foreign regimes – could send an undesirable diplomatic message, and thus "have significant * * * foreign policy ramifications" (J.A. 57). A construction, like respondents', which would " 'strangle' " the

[1] In the lower courts, respondents contended that Subsection 27 does not authorize exclusion on the basis of foreign policy (as opposed to national security) concerns. The court of appeals (Pet. App. 15a), agreeing with the district court (*id.* at 73a-74a), found this to be a "counter-intuitive interpretation of expansive statutory language * * *."

purpose of the statute is highly suspect. See *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962) (quoting *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946)).[2] It does not distort the "plain meaning" of Subsection 27 to conclude that an alien's presence in or entry into the United States is an "activity" that may be prejudicial to the public interest. See 1 Op. Off. Legal Counsel 64, 71 n.10 (1977). Or, to put the matter another way, activities that would not be prejudicial to the public interest if conducted by other persons may nonetheless be prejudicial to the public interest if engaged in by a representative of a foreign power whose presence in the United States for that purpose is disadvantageous to the conduct of our government's foreign relations. Hence, the nature of the aliens' proposed "activity" in the present cases cannot meaningfully be distinguished from that involved in *El-Werfalli* v. *Smith*, 547 F. Supp. 152 (S.D.N.Y. 1982)—a case cited by respondents as a

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[2] Respondents claim (Br. 32-33) that this result may be tolerated because the President has other statutory provisions (besides Subsection 27) at his disposal for exclusion of aliens. Yet, as Judge Bork warned (Pet. App. 60a), if certain aliens may be excluded only by action of the President himself, with all the resonance in diplomatic intercourse that such action portends, then the Executive "will be deprived of much of the flexibility and nuance that are essential in the conduct of foreign relations."

Respondents also suggest (Br. 44) that granting visas to applicants such as those in these cases would not send misleading diplomatic signals if foreign governments were advised of the limited implications of visa decisions. Yet, as the district court found (Pet. App. 80a n.29), the foreign policy consequences of granting or denying a visa are a matter which "[n]either the Court nor plaintiffs are empowered" to judge. There is, at the very least, a potential for damaging confusion in respondents' suggested change in policy. Moreover, regardless of whether the *grant* of a visa would send a wrong message, the *denial* of a visa is an important diplomatic tool which the United States uses to "communicate its attitude about the policies of other states" (J.A. 58). Respondents would deprive the government of this tool.

model of the proper use of Subsection 27 (Br. 18, 31).[3] Nor do respondents dispute the validity of denying entry to "alien officials who engaged in physical brutality while in political power" (Br. 27), without regard to the particular activities in which those aliens seek to engage in the United States.

2. As discussed at length in our opening brief (at 20-22), the State Department's resolution of the entry/presence issue is also fully supported by the repeated references to "entry" and "presence" in the legislative history of Subsection 27 and its predecessors. Respondents seek to soften the force of this evidence by contending that "[i]n virtually every instance" (Br. 23) where Congress referred to entry and presence, it went on also to refer to the likelihood that the alien would engage in prejudicial activities.[4]

Respondents' guarded language implicitly concedes, however, that while certain portions of the legislative record do refer to activities as well as to presence or entry,

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[3] In *El-Werfalli*, the court upheld the government's use of Subsection 27 to exclude a Libyan national who sought to enter this country to study aircraft maintenance. 547 F. Supp. at 152-154. The "act of studying," however, involves no "misconduct" (see *id.* at 154); indeed, it does not necessarily involve *any* conduct other than listening to a teacher or reading a book. Respondents point to the prejudicial *consequences* in *El-Werfalli* of issuing a visa to the Libyan applicant there – namely, that the knowledge he acquired could later "serve the military forces of a hostile government" (Br. 31). And it was precisely to avoid prejudicial foreign policy consequences that the visa applications in the present cases were also denied.

[4] Respondents particularly rely (Br. 20) on the remarks of Senator McCarran in introducing the Internal Security Act of 1950. See 96 Cong. Rec. 14179 (1950). Those remarks, however, did not address the question here at issue. Senator McCarran simply observed that under then-existing practice, diplomats had been allowed to enter the United States even if they planned to engage in hostile "overt acts." *Ibid.* The fact that the 1950 Act would correct this problem does not demonstrate that the Act was unconcerned with aliens whose presence alone in the United States would compromise foreign policy.

other portions refer only to presence or entry and omit any discussion of the alien's other anticipated activities. See, *e.g.*, S. Rep. 1137, 82d Cong., 2d Sess. 27 (1952) (report accompanying the Immigration Act of 1952); 87 Cong. Rec. 4757 (1941) (remarks of Senator Russell, sponsor of the 1941 predecessor to Subsection 27).[5] More fundamentally, respondents' argument proves only that Congress used these terms interchangeably, and that its concern was not with subtle word distinctions, but with excluding aliens whose admission—for whatever reason—might be "prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." 8 U.S.C. 1182(a)(27).[6]

3. Finally, respondents contend (Br. 23-30) that the Executive's resolution of the entry/presence issue is due no deference, both because *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), commits this issue to the judiciary and because the administrative practice on the issue has not been consistent. Neither contention has merit.

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[5] The short discussion in the Senate Report accompanying the 1941 statutory predecessor to Subsection 27 contains no mention of "activities." See S. Rep. 386, 77th Cong., 1st Sess. 1 (1941). In addition, the Report incorporates letters from the Attorney General and Acting Secretary of State describing the 1941 legislation. While the letter from the Attorney General mentions "activities," the letter from the State Department does not.

[6] Respondents also suggest that because various provisions of Section 1182(a) of the Immigration Act explicitly exclude aliens based on their status, but Subsection 27 does not, it should be inferred that Subsection 27 is only "conduct-based" (Br. 17). This argument ignores the fact that Subsection 27 is cast in terms far broader than those of any other exclusion provision. See Pet. App. 38a (Bork, J., dissenting) (the Immigration Act "mandates exclusion in thirty-two separate categories, while preserving in subsection (27), in the broadest of terms, the authority of the Executive to order additional ones"). Thus, while other categories may be targeted at only status or only conduct, there is no reason to assume that Subsection 27 is similarly limited.

a. The question in *Cardoza-Fonseca* was the "narrow" one of whether the standards of "well founded fear of persecution" and "clear probability of prosecution" in the Refugee Act of 1980 were identical. Slip op. 26. The Court rejected an administrative construction that they were.

Cardoza-Fonseca is inapposite, however, for two reasons. First, it appears that the Court there, using the "traditional tools of statutory construction," was led "inexorably to the conclusion" that congressional intent *was* clear and that the government was simply wrong in its interpretation. See slip op. 25-26, 27. This, of course, is entirely consistent with *Chevron U.S.A. Inc.* v. *Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843 (1984), which said that courts are bound to honor the "unambiguously expressed intent of Congress." Conversely, nothing in *Cardoza-Fonseca* suggested that if Congress's intent had not been clear, deference to the administrative construction would not have been given. Indeed, in a post-*Cardoza-Fonseca* case concerning the meaning of "income" in the Aid to Families With Dependent Children statute, Congress's intent was unclear, and the Court's decision thus expressly hinged on principles of deference, as enunciated in *Chevron*, in upholding the administrative construction. *Lukhard* v. *Reed*, No. 85-1358 (Apr. 22, 1987), slip op. 9 (plurality opinion) ("the Secretary's interpretation of the AFDC statute * * * is entitled to deference"); *id.* at 1 (concurring opinion of Blackmun, J.) (resting on "the deference that is due the Secretary of Health and Human Services in his interpretation of the governing statutes"). See also, *e.g.*, *Bowen* v. *Yuckert*, No. 85-1409 (June 8, 1987), slip op. 12 n.8; *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 14. Here, we believe that the legislative evidence shows that Congress intended the word "activities" in Subsection 27 to reach entry and presence—or, in an alternative phrasing, to reach activities that are

objectionable only because of the entry or presence of the particular alien who seeks to engage in those activities. At a minimum, however, this evidence shows that there is no "unambiguously expressed intent" (*Chevron*, 467 U.S. at 843) to the contrary. Thus, to the extent the congressional intent is ambiguous, deference to the reasonable construction of the Executive is warranted—especially in this foreign policy context (see cases cited in Gov't Br. 23).[7]

Second, and more fundamentally, *Cardoza-Fonseca* involved a "pure" question of statutory construction—not what two provisions meant but whether they meant the same thing—while this case, like *Chevron*, involves the "quite different" question of how to apply and what "concrete meaning" to give to a statutory term. *Cardoza-Fonseca*, slip op. 24, 26. For the latter task, the Court in *Cardoza-Fonseca* made quite clear that "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program" (*ibid.*). Here there is no doubt that the " 'decision as to the meaning or reach of [the] statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected' " to the statute. *Chevron*, 467 U.S. at 844-845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 382 (1961)).

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[7] *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), relied upon by respondents (Br. 24-25), is fully consistent with these principles. The question there concerned whether amendments to the Fishermen's Protective Act of 1967 required the Secretary of Commerce to certify that Japan's whaling practices "diminish the effectiveness" of an international convention for the protection of whales. The Court held that this question was not immune from judicial review under the political question doctrine simply because it touched on foreign relations. Slip op. 7-8. On the merits of the question, however, the Court deferred to the "reasonable construction" (*id.* at 19) advanced by the Secretary. See also *id.* at 11-12.

b. This entitlement to deference is not diminished by any inconsistency of administrative interpretation or practice. Respondents' claim of inconsistency is based primarily[8] on various decisions of the Board of Immigration Appeals (Br. 25-26). But the decisions cited are simply

[8] Respondents also claim (Br. 29 & n.26) that the government's position in these cases is inconsistent with State Department practice, as described in 1 Op. Off. Legal Counsel 64 (1977), as well as with a March 1, 1982 memorandum written by the Justice Department Office of Intelligence Policy and Review (J.A. 21-29). These claims are also without merit.

The Office of Legal Counsel opinion does note (1 Op. Off. Legal Counsel at 72) that between 1959 and 1962 certain memoranda and correspondence relating to a single alien questioned whether he could be excluded because of concerns sparked by his entry into this country. But the opinion goes on to observe that regardless of these documents, such concerns "have played a decisive role in the State Department's handling of cases over the years" (*ibid.*).

Similarly unavailing is respondents' reliance on the 1982 Justice Department memorandum. That memorandum had no occasion to address the entry/presence issue at all; moreover, it stated (J.A. 23) that Subsection 27 appeared to be a "direct descendant" of Presidential Proclamation No. 2523, 3 C.F.R. 270 (Supp. 1943)—a Proclamation which authorized the exclusion of any alien whose "*entry* would be prejudicial to the interests of the United States" (*id.* at 271 (emphasis added)). We note that the government has not, as respondents suggest (Br. 22 n.21), "abandoned" the position that Subsection 27 should be construed in light of that Proclamation. On the contrary, the above-mentioned Office of Legal Counsel opinion—which was expressly relied upon in our opening brief (at 24)—endorses the view that Subsection 27 was based upon the Proclamation (see 1 Op. Off. Legal Counsel at 68-69, 71).

See also 8 C.F.R. 175.47 (1941) (including a number of broad "[c]lasses of aliens whose entry is deemed to be prejudicial to the public interest" which were based on status or effect of admission rather than probable activities); 22 C.F.R. 58.47 (1943) (same); 8 C.F.R. 175.47 (1943) (same); 22 C.F.R. 58.53 (1945) (same); 8 C.F.R. 175.53 (1945) (same); 8 C.F.R. 175.53 (1947) (same); 22 C.F.R. 53.33 (1949) (same); 8 C.F.R. 175.53 (1949) (same).

irrelevant to the entry/presence issue. Each involved charges that the alien would engage in particular activities after entering the United States that would themselves be prejudicial to the public interest; the Board therefore was not called upon to consider whether foreign policy concerns raised by the alien's very entry or presence would justify exclusion under Subsection 27.

B.

Respondents make no real effort to address the arguments in our opening brief regarding the McGovern Amendment. They claim that the Amendment applies whenever the government seeks to exclude aliens "based on inferences drawn from their organizational memberships" (Br. 35) in proscribed organizations. In such cases, according to respondents, the government may process the aliens only under Subsection 28—not Subsection 27. But there is nothing in the language or history of the McGovern Amendment to require the government to blink at such inferences, and much to refute such a requirement, as we discussed at length in our opening brief (at 25-33).[9]

[9] The mischief inherent in the court of appeals' "independent of" requirement is illustrated by the recent decision in *Allende* v. *Shultz*, No. 83-3984-C (D. Mass. Mar. 31, 1987). That decision, which expressly relied on the panel decision in the present case in adopting that standard, concluded that the State Department has failed to meet that requirement and thereby to establish a facially legitimate and bona fide reason for refusing to waive a visa applicant's eligibility. It rejected the State Department's conclusion that—because of the applicant's membership in the Soviet-controlled World Peace Council and " 'the delicate relations between the United States and the USSR' " (slip op. 8)—her admission would prejudice United States' foreign policy interests and the visa could properly be denied. Instead, the court entered summary judgment against the State Department and held that plaintiffs were entitled to a declaration that the refusal to grant a visa was unauthorized.

Moreover, the McGovern Amendment makes clear on its face that no such blanket rule was intended, and that it is inapplicable to entire classes of aliens because of inferences to be drawn from their organizational membership. Most tellingly, in 1979 a provision was added to the Amendment declaring that it "does not apply to representatives of purported labor organizations"—even organizations that would otherwise come within Subsection 28—"in countries where such organizations are in fact instruments of a totalitarian state" (22 U.S.C. 2691(b)).[10] Such aliens are outside the ambit of the Amendment because their organizational membership demonstrates that "whatever else they may be" they are "representatives of the state." 125 Cong. Rec. 8345 (1979) (remarks of Rep. Solarz). As discussed in our opening brief (at 30-31), while the 1979 provision specifically mentions only labor leaders, its rationale is far broader. The sponsors of the provision stressed that it was designed to clarify that the McGovern Amendment, as enacted in 1977, was never intended to apply to representatives of foreign states or any other individual "who is excludable under present law." *Ibid.* And, as illustrated by the provision itself, such excludability may be inferred from the alien's organizational membership—whether or not the organization is covered by Subsection 28.

Respondents' suggestion that the government's construction is an "end run around the McGovern Amendment" (Br. 35) not only misses the import of the 1979 provision, it ignores other language in the Amendment as well. In unequivocal terms, 22 U.S.C. 2691(a) states that "[n]othing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership

[10] See also 22 U.S.C. 2691(c) (excluding all members of the Palestine Liberation Organization from coverage by the McGovern Amendment).

in or affiliation with a proscribed organization." As our opening brief shows (at 26-27), this provision is fully applicable here. The aliens in these cases were excluded not because of their membership in Subsection 28 organizations per se, but because their membership in the particular organizations involved here demonstrates that they are affiliated with particular foreign governments and their entry would therefore jeopardize our foreign policy—a "separate ground" for exclusion (*Reid* v. *INS*, 420 U.S. 619, 623 (1975)) covered by Subsection 27.[11]

Accordingly, the visa denials here were entirely consistent with the limited purposes of the McGovern Amendment, even if that Amendment is regarded as imposing a judicially enforceable duty on the Secretary of State.[12]

[11] Respondents question (Br. 37 & n.32; see *id.* at 7 n.9) the government's conclusion that Ms. Finlay and Ms. Lezcano are affiliated with the Cuban government. In particular, they cite *In re Margaret Jo Randall*, No. A11 644 708 (Dep't of Justice, Exec. Off. for Immigr. Rev. Aug. 28, 1986), for the proposition that the Federation of Cuban Women (FMC)—in which both women are officials (see Pet. App. 89a)—is not linked with the Cuban government. Respondents' reliance on the *Randall* case is unwarranted. The conclusions reached by the Immigration Judge there regarding the FMC did not purport to reflect United States policy, but rather were based exclusively on the "evidence of record" (*Randall*, slip op. 25) submitted in that proceeding. That evidence included only the testimony of private individuals (see *id.* at 18, 25). Here, by contrast, the Under Secretary of State testified by affidavit (see Pet. App. 89a) that the FMC is an instrument of the Communist Party of Cuba. Insofar as respondents ask the courts to second-guess this judgment, they seek to initiate an inquiry that could not be "further outside the bounds of judicial competence, or more intrusive with respect to the conduct of foreign affairs" (Pet. App. 52a n.4 (Bork, J., dissenting)).

[12] As Judge Bork noted in dissent (Pet. App. 57a-58a), "it is at least an open question whether the terms of the McGovern Amendment are in fact mandatory." The statute itself says only that the Secretary "should" recommend that certain aliens have visa applications

C.

Respondents urge this Court to construe Subsection 27 narrowly so as to avoid First Amendment concerns that otherwise would be raised by the government's allegedly "content-based" (Br. 42) use of the statute in these cases.

The premise of respondents' argument is erroneous. As both Judge Greene and Judge Bork found in rejecting respondents' First Amendment claims (Pet. App. 80a): "Essentially, these applicants were not denied entry because of the content of the expected speeches, but because of their personal status as officials of governments or organizations which are hostile to the United States." Accord *id.* at 62a (Bork, J.) ("The government does not here enforce a policy of making decisions to exclude based on the content of applicants' political beliefs, but has instead chosen to exclude applicants who are members of or connected with particular foreign governments.").[13] Respondents concede these contrary findings

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approved, and there is much in the legislative history indicating that Congress did not intend the provision to be mandatory. See, *e.g.*, H.R. Conf. Rep. 95-1535, 95th Cong., 2d Sess. 44 (1978); 125 Cong. Rec. 10568 (1979) (remarks of Sens. Javits & McGovern); 125 Cong. Rec. 8347 (1979) (remarks of Reps. Fascell, Ashbrook & Solarz). On the other hand, as Judge Bork noted, the State Department has in the past expressed an interpretation of the McGovern Amendment that, together with some language in the legislative history, supports a mandatory reading. See Pet. App. 57a; see also page 29 of our opening brief (testimony of Mr. Horan). If the McGovern Amendment is not mandatory, then of course it cannot defeat the Secretary's exercise of discretion under Subsection 27 in this case. And, in any event, the precatory nature of the language used in the McGovern Amendment cautions against interpreting that Amendment to deprive the Secretary of discretion that Subsection 27 otherwise confers on him.

[13] Judge Bork also stated (Pet. App. 61a-62a) that, under *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), respondents could not prevail on their First Amendment claims even if the exclusions in these cases were based on the content of the applicants' political beliefs. The

below (Br. 45). Moreover, while it did not decide the First Amendment issue, the court of appeals made essentially the same finding. See Pet. App. 13a (the "dominant reason[]" cited by the State Department for these visa denials was "the continuing status of these aliens as members of organizations or governments hostile to the United States").

These findings reflect the long-standing position of the State Department. As Under Secretary Eagleburger averred, "It is neither the policy nor the purpose of the Department to use visa denials to control or restrict dialogue and debate concerning the policies of the United States or any other member of the world community" (J.A. 59). In the Under Secretary's knowledge, no application for a nonimmigrant visa "has been denied for reasons of foreign policy simply because the applicant was critical of our policies and objectives" (*ibid.*).

Contrary to respondents' suggestion (Br. 45-46), this policy was not abandoned in these cases. Rather, as even respondents acknowledge (Br. 3, 36), Mr. Pasti was excluded pursuant to an Administration policy, then in effect, to deny entry except in limited circumstances to *all* members of the World Peace Council involved in its role as an instrument of Soviet foreign policy (see Pet. App. 93a). Similarly, Ms. Finlay and Ms. Lezcano were excluded because they "intended to travel to the United States * * * as official representatives of the Cuban Government," and thus were subject to the general United States policy of "deny[ing] the entry of officials of the Cuban Communist Party or Government" (*id.* at 90a). And Mr. Borge was excluded because he "intended to travel to the United States *in his official capacity* as a high ranking member of a foreign government" whose foreign

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Court need not decide this question, however, because the exclusions were properly found by the district court to have been content-neutral.

policy goals are "directly opposed to those of the United States" (*id.* at 86a-87a (emphasis in original)).[14]

Given this record, then, there are no "First Amendment problems" (Resp. Br. 40) which the Court need skirt in resolving the statutory issues in these cases.[15] This Court has long since recognized that, although content-neutral restrictions on travel to or from foreign countries can always be said to lessen opportunities for the gathering and interchange of information, they are not for that reason constitutionally infirm. *Zemel* v. *Rusk*, 381 U.S. 1 (1965). And the Court specificially held in *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972), that the First Amendment rights of American citizens suffer no damage when the reason for visa denials is "facially legitimate and bona fide." The foreign policy concerns that form the basis for the denials here manifestly satisfy that test.[16] *Kleindienst* also makes clear that, where the State Department has articulated such valid reasons for a visa denial, it is inappropriate for the courts to "look behind" those reasons (*ibid.*). Accordingly, respondents have no plausible First Amendment claims.

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[14] Respondents are, therefore, making an irrelevant point when they cite (Br. 8 & n.12, 41) statements by government trial counsel that, assuming arguendo that a content-based exclusion were made, it would be permissible. In responding to this hypothetical question from the district court, counsel for the government stressed repeatedly that "nothing in the record" suggested that the exclusions here were based on the content of the applicants' political beliefs (see July 2, 1984 Tr. 57-59).

[15] Respondents cite a legion of cases involving alleged "content-based censorial judgments" (Br. 43). Those cases are all inapposite to the government's content-neutral exclusion decisions here.

[16] Since *Kleindienst* clearly controls respondents' First Amendment claims in this case, we continue to urge the Court to dispose of those claims without further remand (see Gov't Br. 36-37 n.19).

For these reasons and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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BRIEF OF AMICI CURIAE

THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-656

RONALD W. REAGAN, *et al.*,
Petitioners

v.

JAMES ABOUREZK, *et al.*

GEORGE P. SHULTZ, *et al.*,
Petitioners

v.

CITY OF NEW YORK, *et al.*

GEORGE P. SHULTZ, *et al.*,
Petitioners

v.

BRUCE CRONIN, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law center with nationwide membership, based in Washington, D.C. WLF engages in

litigation and administrative cases concerning a variety of issues of concern to its membership. One of WLF's primary goals is the preservation and enhancement of U.S. national security. WLF has been especially active in cases involving attempts to impose judicial constraints on the federal government's capacity and authority to protect national security. WLF has appeared as *amicus* in numerous cases before the Court, including *Meese v. Keene*, No. 85-1180, dealing with the enforcement of the Foreign Agents Registration Act.

The Allied Educational Foundation ("AEF"), established in 1964, is a non-profit charitable and educational foundation based in Englewood, New Jersey, and devoted to the expansion of knowledge and education in a broad variety of areas including immigration and foreign affairs issues. AEF appeared along with WLF as amici in *Meese v. Keene*.

Amici seek to ensure that the proper administration of the laws in the sensitive area of foreign affairs by the political branches are not intruded upon by the judiciary. In that regard, while the parties will focus on the merits of the case, *amici* will focus on the justiciable issues of standing and judicial review which this Court has the power and duty to address.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt by reference the statement of the case as set forth in the brief of the petitioners.

SUMMARY OF ARGUMENT

Plaintiffs have not satisfied the constitutional or prudential requirements of standing to challenge the decision by a consular officer denying an alien's visa application. Significantly, no showing has been made that the alleged injury to their alleged First Amendment right to

see an alien in person will likely be redressed by this court's opinion on the meaning of the excludability provision of subsection (27) and its relationship with subsection (28) of section 1182(a) of the Immigration and Naturalization Act. This is especially so where the McGovern Amendment does not compel a waiver if subsection (28) were invoked.

Furthermore, *amici* submit that the granting or denial of a visa application is committed to the agency's discretion by law, and that judicial review is precluded. Finally, *amici* submit that the Executive's interpretation of subsection (27)—that the mere presence in the United States of aliens who are affiliated with hostile foreign governments may be prejudicial to the interests of the United States—is reasonable and not arbitrary or capricious.

ARGUMENT

I. RESPONDENTS, AS MERE INVITEES OF AN ALIEN, HAVE NO STANDING TO CHALLENGE THE DENIAL OF THE ALIEN'S VISA APPLICATION REGARDLESS OF THE REASON FOR THE DENIAL.

Article III limits the power of federal courts to hear only justiciable "cases" or "controversies." A litigant must " 'show that he personally has suffered some actual threatened injury as a result of the putative illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action,' and 'is likely to be redressed by a favorable decision.' " *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (footnote and citations omitted). In addition, the plaintiffs must satisfy the prudential requirements of standing,

> such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the

> requirement that a plaintiff's complaint fall within the zone of interest protected by the law invoked.

Allen v. Wright, 468 U.S. 737, 751 (1984)

The lower court found that plaintiffs "are substantively interested in, and adversely affected by, the Department's interpretation of subsection (27) as it coexists with subsection (28) [and] are . . . at least arguably within the zone regulated by the statute." *Abourezk v. Reagan*, 785 F.2d 1043, 1051 (D.C. Cir. 1986). *Amici* submit, however, that the lower court erred on this issue, and that plaintiffs lack standing to invoke the judicial machinery to determine the legality of the Executive's denial of a visa to an alien whom plaintiffs wish to see and hear in person, regardless of the reason for the denial. This is especially so where, as here, the alien himself has no right to seek judicial review of a consular decision denying his visa application. In other words, the unreviewability of a consular decision denying a visa should not be circumvented by merely substituting as plaintiffs who are, at best, indirectly affected by the decision.

For if plaintiffs are found to have standing in this case to challenge the government's refusal to allow a person to visit and speak with them, then any invitor or, for that matter, any person wishing to attend a planned meeting and to associate or speak with the alien invitee, can invoke the judicial machinery to adjudicate the validity of the government's decision. *Cf. Haitian Refugee Center v. Gracey*, —— F.2d —— (D.C. Cir. No. 85-5258) (Jan. 9, 1987) (member of refugee counseling center wishing to associate with Haitians lack article III standing and center itself lacks prudential standing to challenge Executive order and practice of interdicting undocumented Haitians aboard vessels on the high seas). Could the airline which booked passage for the excluded alien, or the hotel where the alien was expected to stay, and which consequently lost the profits due to the can-

cellations caused by the visa denial, sue the State Department to determine the validity of the visa denial? *Cf. Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258 (D.C. Cir. 1980)? Could any alien whose visa was denied under any of the 33 grounds in 8 U.S.C. § 1182, have their case adjudicated by a person who simply invited them to the United States?

For example, if the aliens were excluded not on an "ideological" basis as the plaintiffs allege, but on the basis that the alien was "insane", under § 1182(a)(2), or having "one or more attacks of insanity", § 1182(a)(3), or afflicted with a "dangerous contagious disease", § 1182(a)(5), or whatever other reason, the plaintiffs' injury would be the same—they would be prevented by the government from hearing or seeing an alien in person due to the denial of the visa application. The question in that case would be whether that injury to their right to receive ideas entitles the plaintiffs to adjudicate the validity of the government's invocation of "insanity" under § 1182(a)(2). Could the plaintiffs argue, for example, that the grounds of "insanity" under § 1182(a)(2) could not be invoked by the government because the aliens were not really insane, but suffered only one or more attacks of insanity and therefore § 1182(a)(3) could only be invoked? Could the plaintiffs argue that the reasons for invoking § 1182(a)(2) must be "independent of" instead of "in addition to" the reasons under § 1182(a)(3)?

This broadening of the standing doctrine could easily extend beyond the immigration field. For what would prevent a person who wished to speak with or associate with an incarcerated criminal, or invited the criminal to appear before a university audience, television talk show, or other forum, from having standing to adjudicate the lawfulness of the parole board or warden's refusal to release the inmate on parole or temporary furlough? Could such a plaintiff adjudicate the underlying lawfulness of

the inmate's incarceration without the necessity of the inmate invoking habeas corpus or other usual review proceedings to determine the lawfulness of his conviction or continued incarceration? For if the plaintiffs have standing here to adjudicate the government's interpretation of one body of law—in this case, the immigration laws—which prevents an individual from speaking to them in person, then they or any other person has standing to adjudicate the government's interpretation of any other body of law, *e.g.*, criminal law, mental health law, and so forth, which permits the government to deny or prevent one person from meeting another citizen. These concerns also support *amici's* position discussed in Part II that judicial review is precluded, regardless of whether standing can be found.

A. Plaintiffs Have Suffered No Judicially Cognizable Injury-In-Fact Since Their Interest In Hearing or Seeing An Alien In Person Is A Generalized Interest.

In this case, plaintiffs are individuals and organizations interested in hearing the views of various aliens on various topics. While plaintiffs may allege that they have a First Amendment right to receive information and ideas, this is a generalized interest shared by everyone who wishes to receive information from these aliens. Further, this right is not infringed by the nonappearance of the invitee since plaintiffs have ample alternative means of receiving those ideas, through books, literature, and telephonic or satellite hookups that would enable the plaintiffs to receive these ideas and even question the speaker. The only "infringement" is the inability to see, hear and talk to the alien in person.

Respondents, however, rely on *Kleindienst v. Mandel*, 408 U.S. 766 (1972), for the proposition that invitors have standing to litigate the validity of a visa denial. In the first place, the excluded alien in that case, Dr. Mandel, was a plaintiff in that action, whereas none of

the excluded aliens are parties in the instant case. Secondly, "the Court's opinion in [*Mandel*] does not discuss standing and so does not constitute a precedent," *Haitian Refugee Center v. Gracey, supra*, slip op. at 10, although it has been suggested that standing was implicitly found. *Id.* Nevertheless, *amici* submit that this "infringement" is insufficient to satisfy the first prong of article III standing, injury-in-fact. In any event, this alleged injury is not redressable and thus the second constitutional prong of standing has not been satisfied.

B. Plaintiffs Have Failed To Satisfy The Redressability and Causation Prongs of Standing.

It is well settled that in order for a party to have standing, it must be shown that there is a substantial likelihood that plaintiffs' injury will be redressed by a favorable opinion. *Allen v. Wright*, 468 U.S. 737 (1984). Related to the redressibility issue is causation, *i.e.*, whether the named defendants are the cause of plaintiffs' injury. These critical aspects of article III standing, which were never addressed in the court below nor by this Court in *Kleindienst v. Mandel*, are lacking in the instant case.

A careful examination of the facts in this case, as well as the relevant law and procedures governing visa applications, show that even if subsection (27) could not be properly invoked, plaintiffs have not demonstrated that the aliens would otherwise be admissible or admitted into this country. In the first place, the aliens would have to reapply for a visa and the government would have the opportunity to deny the visa applications on any of the other 32 grounds. Assuming that subsection (27) is not invoked by the consular officer, it is clear that all the aliens are members of or affiliated with organizations excludable under subsection 28. Indeed, the record shows that the consular officer found Nino Pasti ineligible for a visa under subsection 28. 785 F.2d at 1048.

Once subsection 28 is invoked, the McGovern Amendment, 22 U.S.C. § 2691, which allows for a waiver of subsection 28, comes into play. But the McGovern Amendment, as well as other waiver provisions found in 8 U.S.C. § 1182(d), do not compel waivers of those aliens excludable under subsection 28. The McGovern Amendment only directs that the Secretary of State "should" recommend a waiver to the Attorney General, who then has the unfettered discretion to grant or deny the waiver. While Judge Bork said below that whether or not the waiver provision of McGovern Amendment is mandatory is "an open question", the language of the statute and legislative history presented by Judge Bork in his dissent clearly shows that the question has been answered.

First, the McGovern Amendment uses the hortatory phrase "should", and not the mandatory "shall". Congress clearly knows the legal significance of each of these two words. In § 1182(d)(3), for example, which concerns the nonapplicability of 30 categories of exclusions, Congress declared that waivers "*may*" be granted. On the other hand, § 1182(h) provides for certain circumstances where waivers "*shall*" be issued. The word "*should*" found in the McGovern Amendment has a meaning that probably falls somewhere between "may" and "shall," but in any event, is not a mandatory command, but at best, a mere expression of congressional preference. Since the langage of the McGovern Amendment is clearly nonmandatory, there is no need to resort to the legislative history. But if the legislative history is examined, further support is found. As Judge Bork correctly observed below:

> In 1978, the Senate voted in favor of amending the provision to substitute the word "shall" for "should," but that revision was dropped at conference and the original language was retained. H.Rep. No. 1535, 95th Cong., 2d Sess. 44 (1978), U.S. Code Cong. & Admin. News 1978 pp. 2424, 2485. In 1979, during a discussion on the House floor over proposed modi-

fications of the McGovern Amendment, Congressman Solarz stated:

> Right now, under the McGovern Amendment, the Secretary of State is obligated to recommend the waiver that they be admitted, unless he believes that admitting them would constitute a threat to the national security of the United States; and if he feels that they will not constitute a threat to the national security of the United States, he is obligated to recommend the waiver.

125 Cong. Rec. 8347 (1979). Congressman Fascell, Chairman of the Subcommittee on International Operations, responded:

> I just want to say that I agree with the explanation made by the gentleman from New York (Mr. Solarz), with one correction: The present language of the law, that is, the McGovern amendment, is not mandatory.
>
> Other than that, Mr. Chairman, I would agree with everything which the gentleman from New York has said.

Id. A bit later, Congressman Solarz indicated his agreement:

> If the gentleman will yield, I want to underline what the subcommittee chairman said, that the McGovern language is not mandatory. The Conferees went to a good deal of trouble to use the word "would," [sic] not "shall," . . .

785 F.2d at 1073.

Since the statute and legislative history is clear, the McGovern Amendment is not mandatory regardless of the desire of the proponents of the McGovern Amendment to implement the Helsinki Accords, and regardless of some letter written by a State Department official suggesting that the amendment limits the Secretary's discretion. 785 F.2d at 1057 (letter of Alvin Paul Drischler).

Secondly, even if a waiver request by the Secretary of State were "mandatory" under the McGovern Amendment, there is no dispute that the statute nevertheless gives *unfettered discretion* to the Attorney General to deny the waiver request. Thus, since the plaintiffs have made no showing that there would be any likelihood that the Attorney General would approve any such waiver, there is, concomitantly, no likelihood that their injury would be redressed. While Judge Bork correctly observed that this interplay between the authority of the Attorney General and the Secretary of State "has unfortunate consequences for the majority's reasoning" since the denial of a waiver remains " 'walled off from any effective challenge' ", *id.* at 1075-1074, the other "unfortunate consequence" of this discretion overlooked by the court below is that the redressability prong of Article III standing is fatally missing.[1]

C. Plaintiffs' Injury Is Not Caused By Any of the Defendants.

Related to the redressability prong of standing is the causation requirement, *i.e.*, is the alleged injury to be redressed caused by the named defendants. In this case,

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[1] Even the Secretary's alleged mandatory duty to recommend a waiver may not be necessarily triggered in this case since the McGovern Amendment further provides that:

> (d) The Secretary of State *may refuse* to recommend a waiver for aliens from signatory countries which are not in substantial compliance with the provisions of the Helsinki Final Act, particularly the human rights and humanitarian affairs provisions. 22 U.S.C. § 2691(d) (emphasis added).

It is clear that in the cases of excluded aliens, Tomas Borge from Nicaragua and the women from Cuba, their countries are *not* in substantial compliance with the Helsinki Act . Thus, at best, that leaves only Nino Pasti from Italy who could arguably get past the first hurdle of the waiver procedures of the McGovern Amendment. But even in Pasti's case, plaintiffs are far from satisfying the redressability requirement.

plaintiffs' prayer for relief seeks a declaration that Section 27 is inapplicable and that a visa be issued to the excluded aliens. It is this injunctive relief that is crucial to redressing plaintiffs' injuries.

There is a total of four individual named defendants in these cases before the court: the President, the Secretary of State, the Attorney General and the Director of the Immigration and Naturalization Service. It is clear, however, that while these four named defendants have various responsibilities in the administration of the immigration laws, the actual issuance of visas, which is what plaintiffs ultimately seek, is not under the purview of the President, INS, or the Attorney General. The only remaining named defendant that might be involved in the visa application process is George P. Shultz, the Secretary of State. Yet the Secretary of State is not charged with the responsibility of issuing visas. Congress has declared that only consular officers possess the authority to issue or deny visas. 8 U.S.C. § 1201(a). The Attorney General, for example, can only order aliens to be excluded who have already arrived at our shores, 8 U.S.C. § 1225(c), or order their deportation. 8 U.S.C. § 1251. Visas, *once issued* by the consular officer, can be revoked by the Attorney General or the Secretary of State. 8 U.S.C. § 1201(i). But the issuance of the visa can be made only by the appropriate consular officer who has not been made a party before this Court.

Plaintiffs may argue that any court order directed to the Secretary of State would suffice in this case since the Secretary is superior to the consular officers. However, Congress expressly *excluded* the Secretary of State from exercising any powers, duties, or functions, over the granting or denial of visas. The Secretary of State's powers and duties in the immigration field are found in 8 U.S.C. § 1104. Section 1104(a) states in pertinent part that:

> The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to (1) the powers, duties and functions of diplomatic and consular officers of the United States, *except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas* . . . .

8 U.S.C. § 1104(a)(1) (emphasis added).

The only role for certain nonconsular officers of the State Department is the administrative practice of providing "advisory opinions" to the consular officer. 22 C.F.R. §§ 41.130(b), (c). As the name implies, "advisory opinions" are advisory and can be rejected by the consular officer. While pure questions of law are made binding on the consular officer, the consular officer retains the sole discretion in applying the particular facts of each visa application to the law expressed in the opinion. 22 C.F.R. § 41.132(c). *See also* Affidavit of Louis P. Goelz, Deputy Assistant Secretary of State for Visa Services, ¶¶ 4, 8. Joint Appendix at 83.

Accordingly, the plaintiffs lack standing for failing to satisfy the redressability and causation requirements of Article III standing.

D. Plaintiffs Injuries Are Not Within The Zone of Interests Congress Sought To Protect or Regulate By the Statute.

Even if plaintiffs satisfied the Article III standing requirements, standing should be denied for prudential reasons since plaintiffs' injury is not within the zone of interest Congress intended to protect or regulate by the immigration laws. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The entire scheme of the law which mandates the exclusion of 33 categories of aliens is to protect the general welfare and interest of all citizens of this country by keeping those aliens out. If anything, a U.S. citi-

zen who *objected* to the admission of an excludable alien would be more within the zone of interest sought to be protected than a person such as one of the instant plaintiffs who object to the alien's exclusion. *See International Union of Bricklayers and Allied Craftsmen v. Meese*, 761 F.2d 798 (D.C. Cir. 1985).

As for the zone of interest to be regulated, the law regulates the alien, not the invitee or third party, except in those limited circumstances where Congress expressed its concern of a particular provision's impact on specified third parties, such as employers or relatives. *See* 8 U.S.C. § 1182(a)(14). Plaintiffs do not fall within the zone of interest Congress intended to regulate, merely because they cannot see or hear the alien in person. If plaintiffs were in the zone Congress intended to regulate, so would every other citizen.

II. CONSULAR DECISIONS TO ISSUE OR WITHHOLD NONIMMIGRANT VISAS ARE JUDICIALLY UNREVIEWABLE BOTH BECAUSE OF THE FOREIGN AFFAIRS IMPLICATIONS AND CONGRESS'S FAILURE TO PROVIDE FOR REVIEW OF SUCH DECISIONS.

The exclusion and deportation of aliens fall within that category of policy decisions, which "so far as the subjects are concerned, are necessarily conclusive upon all . . . [the government's] department and officers," including "the judiciary." *The Chinese Exclusion Case*, 130 U.S. 581 (1889). This Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control." *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953).

Congress has mandated that 33 categories of aliens are "ineligible to receive visas and *shall be excluded* from admission into the United States." 8 U.S.C. § 1182(a) (emphasis added). Lest there be any doubt as to the com-

mitment of the power to exclude aliens to the political departments, Congress has given the President discretion to suspend the entry "of *all* aliens or any class of aliens as immigrants or nonimmigrants . . . ." 8 U.S.C. § 1182 (f) (emphasis added).[2]

Thus, there is no dispute that an alien has neither a constitutional nor statutory right to enter the United States. To be sure, once an alien has found his or her way into this country either through legal or illegal means, procedural and other rights may attach. Nevertheless, the overall legislative scheme of the immigration laws indicates no intention by Congress that visa denials were to be reviewable.

For example, Congress expressly provided for judicial review of deportation orders under 8 U.S.C. § 1105a, and made such procedure the "sole and exclusive procedure" for judicial review. *Id.* That detailed procedure provides, *inter alia*, for the time for filing the petition, § 1105a(1), venue, § 1105a(2), habeas corpus relief, § 1105a(b), and exhaustion of administrative remedies, § 1105a(c). Other parts of the statute are replete with complex and detailed procedural requirements relating to other aspects of the administration of the immigration laws. *See, e.g.*, 8 U.S.C. § 1226.

Yet, in the area of visa denials, Congress could easily have but chose not to provide for any procedures or judicial review. Indeed, even if this Court could order the issuance of the visa to the aliens, it is clear that the issuance of a visa does not entitle the alien to be automatically admitted into this country, but only enables the alien to present himself at the port of entry for inspec-

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[2] The lower court's view that it was not intruding on the conduct of foreign policy because § 1182(f) would allow the President to exclude the four aliens in question here may not be entirely correct unless Tomas Borge, for example, was put into a "class" all by himself. Rather, it is the other provisions of the law that leave to the Executive the power to exclude specific aliens.

tion by immigration officials. *Sague v. United States*, 416 F. Supp. 217 (D.C. Puerto Rico 1976). Thus, once at the port, Congress has given the Attorney General the discretion to exclude the alien if it appears that the alien is excludable under subsection (27), (28), or (29), and may do so on the basis of confidential information. 8 U.S.C. § 1225(c). This provision was certainly not repealed by the McGovern Amendment.[3] The only statutory provision relating to the procedures for the issuance of a visa is found in 8 U.S.C. § 1361 where Congress put the "burden of proof" on the alien "to establish that he is eligible to receive such visa . . . or is not subject to exclusion under any provision of [the Act]." (emphasis added). The four aliens in this case did not even attempt to carry, let alone satisfy, the "burden of proof" Congress placed on them. Furthermore, if the alien fails to establish "to the satisfaction of the consular officer that he is eligible to receive a visa" no visa shall be issued unless "he establishes *to the satisfaction of the Attorney General* that he is not subject to exclusion under any provision of this Act." (emphasis added). Again, no such effort was made, but in any event, the Attorney General retains the discretion to determine whether the alien is excludable.

All of the foregoing demonstrates that Congress committed by law the discretion to the government agencies and officers involved to grant or refuse visa applications. Accordingly, judicial review of the exercise of that discretion is precluded under 5 U.S.C. § 701(a)(1). *Heckler v. Chaney*, 105 S. Ct. 1649 (1985). This is particularly true where the subject matter at hand involves the

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[3] Thus, not only is the McGovern Amendment not mandatory, it also falls short of the mark for it only speaks of the issuance of a visa, not the automatic admission of the alien. While Congress may have intended that admission would be required, the words Congress chose are controlling. Congress is of course free to amend the McGovern Amendment to narrow or eliminate the discretion now enjoyed by the Executive.

sensitive exercise of the President's foreign affairs powers. In that regard, the political question doctrine is implicated since the resolution of this issue would impermissibly involve this Court in areas committed to the political branches of the government. *Baker v. Carr*, 362 U.S. 136, 217 (1962); *Goldwater v. Carter*, 444 U.S. 996 (1979).

In the alternative, *amici* submit that the failure of the Congress to provide for judicial review of the visa process compared to the carefully crafted procedural and review provisions provided for other aspects of the immigration laws, such as deportation, is strong evidence that Congress intended that judicial review be precluded. 5 U.S.C. § 701(a)(2). *See Block v. Community Nutrition Institute*, 467 U.S. 340 (1984).

III. THE EXCLUSION OF THE ALIENS UNDER SUBSECTION (27) BECAUSE OF THEIR AFFILIATION WITH CERTAIN FOREIGN GOVERNMENTS WAS PROPER.

Assuming that this Court reaches the merits of the controversy, *amici* submit that it was entirely appropriate for the government to exclude the aliens in question under subsection (27) because of their affiliation with certain foreign governments. Judge Bork below correctly determined that subsection (27) authorizes the exclusion of any alien whose mere presence or entry is considered prejudicial to the interests of the United States. 785 F.2d at 1066 (Bork, J., dissenting). Judge Bork also correctly determined that the reason for exclusion under subsection (27) need not be "independent" of the alien's membership or affiliation with a communist organization under subsection (28), any more than subsection (2) (aliens who are insane) must be independent of subsection (3) (one or more attacks of insanity), or subsection (12) (exclusion of prostitutes) must be independent of subsection (13) (engaging in any immoral sexual act).

The practice of the Executive in excluding aliens under subsections (27) and (28) are to be afforded due deference by the court especially in this highly sensitive area of foreign policy. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

But even if the mere presence of the alien in this country is insufficient to constitute an "activity" under subsection (27) prejudicial to the interests of the United States, *amici* submit that the facts show more than mere presence is involved. The aliens have indicated their desire to meet with certain U.S. Congressmen, the press, and so forth. Thus, regardless of what the alien wants to say at those meetings or what the Congressmen wish to hear, the visible *activity* of meeting or associating with the individuals may signal to other countries certain foreign policy implications because of those aliens' affiliation with hostile foreign governments, *i.e.*, Cuba, the Soviet Union, and Nicaragua. In other words, the mere presence of such an alien in this country may, under other circumstances, go undetected and have no foreign policy consequence. But if the alien who is affiliated with the hostile government is shown in the press meeting with or shaking the hands of certain Congressmen, that visible activity could reasonably be concluded by the government to have adverse foreign policy consequences. Accordingly, it is within the discretion of the Executive to exclude these aliens either under subsections (27) or (28), or both.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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BRIEF AMICI CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND PEOPLE FOR THE AMERICAN WAY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-656

RONALD W. REAGAN, *et al.*,
Petitioners

v.

JAMES P. ABOUREZK, *et al.*

GEORGE P. SHULTZ, *et al.*,
Petitioners

v.

CITY OF NEW YORK, *et al.*

GEORGE P. SHULTZ, *et al.*,
Petitioners

v.

BRUCE CRONIN, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICI CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND PEOPLE FOR THE AMERICAN WAY

This brief *amici curiae* is filed in support of respondents on behalf of the American Association of University Professors and People for the American Way with the consent of both parties.

INTEREST OF AMICI CURIAE

Founded in 1915, the American Association of University Professors ("AAUP") is an organization of over 50,000 faculty members and research scholars in all the academic disciplines. AAUP is committed to the defense of academic freedom and the free exchange of ideas. In pursuit of this commitment, AAUP has consistently urged reform of United States immigration laws in order to facilitate visits by foreign scholars and students. A particular focus of its efforts has been the McCarran-Walter Act,[1] one subsection of which served as the basis for the denial of visas in this case.[2] Since the passage of the Act in 1952, AAUP has been outspoken in its support of modification or partial repeal.[3] Most recently, AAUP has actively supported amendments to the Act and encouraged the repeal of §§ 212(a)(27) and (28).[4]

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[1] Otherwise known as the Immigration and Nationality Act of 1952.

[2] Section 212(a)(27), 8 U.S.C. § 1182(a)(27) (1976).

[3] In that year, in fact, the AAUP passed a resolution at its annual meeting calling for "the removal of legislative and administrative barriers to the visits of foreign students and scholars to this country." *Cited in Exclusion and Deportation Amendments of 1983: Hearings on H.R. 4509 and H.R. 5227 before the Subcommittee on Immigration, Refugees and International Law of the Committee on the Judiciary of the House of Representatives*, 98th Cong., 2d Sess. 211 (1975) (hereinafter referred to as *Hearings on Exclusion and Deportation Amendments*).

[4] In 1981, the AAUP passed a resolution calling for repeal of the Immigration and Nationality Act "under which persons intending to visit this country on non-immigrant status for *bona fide* academic reasons may be denied visas because of their political beliefs or associations." *Hearings on Exclusion and Deportation Amend-*

It has intervened on behalf of foreign scholars who have been excluded from this country on the basis of their political beliefs and associations.[5] The British counterpart of AAUP, the Association of University

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ments, supra note 3 at 211. *Section 212a(a)(28) of the Immigration and Nationality Act: The Case for Repeal, Comments Submitted to the Select Commission of Immigration and Refugee Policy by the Fund for Free Expression, PEN American Center, the Lawyers Committee for International Human Rights, the Association of American Publishers, the Helsinki Watch, the American Association of University Professors, the American Association for the Advancement of Science, the American Sociological Association, the American Library Association, and the National Academy of Science (1980)*; *see also, supra* note 3.

[5] For example, on January 7, 1983, Irving J. Spitzberg, Jr., then General Secretary of the AAUP, wrote to George Shultz, Secretary of State, to express the concern of the Association over the denial of visas, under § 212(a)(27), to two Cuban philosophy professors who had been invited to participate in a conference sponsored by the American Philosophical Association. Shortly thereafter, on March 22, 1983, a similar letter was sent to the Department of State protesting the denial of a visa under § 212(a)(28), to a professor at the University of the West Indies who was scheduled to participate in a conference at the University of Cincinnati. The letter stated:

> From all that we can determine, the Department of State has refused temporary admission of this foreign scholar because of his political beliefs or associations. Plainly such grounds for denying a visa are inconsistent with the principles of a free society and incompatible with academic freedom. We do not see how such action can serve the commitment of the Department of State, in your words, to foster "objective discussion of political, economic and social concepts and issues."

Letter dated March 22, 1983 from Irving J. Spitzberg, Jr. to Secretary of State George Schultz. On February 21, 1986 AAUP's president wrote to Secretary Schultz expressing serious concern over the prospect that a visa would be denied to Dr. Joyce de Wangen-Blau, a professor at the Sorbonne and expert in the Kurdish language, who had been invited to speak in New York City at the March 22 opening of the first Kurdish library in North America. Dr. de Wangen-Blau was barred, under § 212(a)(28), from attending.

Teachers ("AUT") has described the deterrent effect of the ideological exclusion provisions on foreign scholars' willingness even to apply for American visas. The General Secretary of AUT, responding to a letter from AAUP seeking information on visa denials, stated:

> The record of actual refusals is small, not because of the liberal attitude of the United States Government, but because many of our members, as a matter of principle, consider it an anathema to have to attest as to their political views and affiliations; thus, many academics will not apply because they do not wish to place themselves in the position of signing declarations to that effect.[6]

Because of its long-standing concern about §§ 212(a)(27) and (28), AAUP participated as *amicus curiae* in the court of appeals in this case.[7]

People For The American Way is a 250,000 member, non-partisan education-oriented citizens' organization

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[6] Letter dated March 19, 1980, from Laurie Sapper (AUT) to Jonathan Knight (AAUP). Two months later then-AUT President Andrew Taylor, in declining an invitation to attend AAUP's annual meeting, described the difficulties he typically encountered with the Department of State:

> In the past I have been able to obtain a special restricted visa to attend scientific conferences but this entails a long complicated process requiring an application to be made many months in advance, the completion of very long detailed questionnaires and not knowing if I am actually going to get a visa until about four days before departing for the United States. On this occasion I obviously do not have the time to carry out all this procedure.

Letter dated May 29, 1980, from Professor Andrew Taylor to Professor Martha Friedman, *cited in Hearings on Exclusion and Deportation Amendments, supra* note 3 at 166.

[7] The AAUP also recently filed a brief *amicus curiae* in support of Professor Margaret Randall, whose application for permanent residence status has been denied due to the content of her writings. *Randall v. Meese*, Civ. 85-3415 (D.D.C.)

dedicated to protecting constitutional rights and democratic values. Since its founding in 1980, one of People For The American Way's primary objectives has been to work against censorship and promoting the free trade of ideas in academic and other settings. Two presumptions—that the government is entitled to restrict and dictate what citizens may know, and that government alone knows what is best for the people it is supposed to serve—threaten traditional liberties that are at issue in this case. People For The American Way has worked to amend the McCarran-Walter Act and repeal the ideological exclusion sections 212(a)(27) and (28). Senator Paul Simon, a leading supporter of these reforms, introduced written testimony by People for the American Way Chairman John Buchanan, entitled "Free Trade in Ideas: The Strength of the First Amendment," at a Senate hearing on that subject on August 11, 1986. The organization is currently working closely with the committees and members of Congress who seek to reform the Act during the 100th Congress and has embarked on a major public education effort to assist in this process.

STATEMENT OF THE CASE

Amici offer a brief description of some of the invitations to aliens underlying the complaints in these actions. Among the respondents in *Reagan v. Abourezk* is John Coatsworth, a history professor at the University of Chicago. Coatsworth had extended an invitation to Tomas Borge for a speaking engagement at a luncheon of University of Chicago faculty members. Reverend Harvey Cox, a professor of divinity at Harvard University, invited Borge for two meetings he had planned with religious leaders in the Boston area. In *City of New York v. Shultz*, many of the invitations to Olga Finley and Leonor Rodriguez Lezcano came from members of the academic community. The respondents in that case include Thomas Holloway, head of Cornell Uni-

versity's Latin American Studies Program; Sally McConnell-Ginet, head of Cornell's Women's Studies Program; David Rudstein, associate dean and professor of law at the Illinois Institute of Technology Chicago-Kent College of Law; Edna Acosta-Belen, head of the Puerto Rican-Latin American-Caribbean Studies Program at the State University of New York at Albany; Barbara Corrado Pope, director of Women's Studies at the University of Oregon; Mary Kay Vaughan, director of the Latin American Studies Program at the University of Illinois at Chicago; and student groups at Cornell University and the Harvard Law School. The New College of California, itself a respondent, extended an invitation in September 1983 to Finley and Lezcano to speak on the campus.

SUMMARY OF ARGUMENT

The government would have this Court approve a sweeping interpretation of § 212(a)(27) which denies citizens the opportunity to meet with aliens whose activities pose no threat of harm to the United States. The First Amendment does little if it does not protect citizens' rights to debate with these invited visitors. Opportunities for personal discourse are central to scholarly activity, and academic freedom is itself a special concern of the First Amendment.

The government justifies its intrusion on the ground that the visa denials send a foreign policy message of official disapproval of certain policies. Apart from whether any unambiguous message was conveyed by the visa denials at issue, the government's purpose is fundamentally illegitimate, as prior rulings of the Court demonstrate. In burdening the visa application process with its own symbolic message, the government upends the First Amendment rights of scholars and other citizens. The foreign policy context of the case does not deprive the Court of the power to strike down this abuse.

ARGUMENT

The government devotes only a footnote to its brief to the constitutional issues in this case. Pet. Br. 36-37 fn. 19. Even if the Court's resolution does not speak directly to the constitutionality of § 212(a)(27), the First Amendment considerations should inform the construction of the statute. Immigration cases make clear that the courts should adopt a narrow reading of the statute if necessary to "save" its constitutionality. *See Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957); *Bridges v. Wixon*, 326 U.S. 135, 147-49 (1945). Amici submit that the statute as interpreted by petitioners cannot withstand a First Amendment challenge.

I. Section 212(a)(27) Infringes Academic Freedom in Barring Discourse Among Scholars on Ideological Grounds.

The government seeks approval for a system that denies scholars and other citizens access to aliens holding points of view disfavored by the Administration. This interpretation of § 212(a)(27) has a grave impact on activities protected by the First Amendment. The underlying philosophy represented by the First Amendment is a belief "in the power of reason as applied through public discussion" [8] and that "the ultimate good desired is better reached by free trade in ideas." [9]

The First Amendment protects not only speech and other expressive activities but also the right to receive information and ideas. As the Court indicated in *Stanley*

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[8] *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[9] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. joined by Brandeis, J., dissenting).

v. Georgia, the right to convey information "necessarily protects the right to receive" it as well. 394 U.S. 557, 564 (1969), quoted in *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). Discussion and debate by their very nature cannot be solitary activities. As Justice Brennan observed, concurring in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965), "[i]t would be a barren marketplace of ideas that had only sellers and no buyers." *See Procunier v. Martinez*, 416 U.S. 396 (1974); *Abourezk v. Reagan*, 592 F. Supp. 880, 886 (D.D.C. 1984). The right to receive information protects not only public debate but also the exchange of ideas among scholars. Represented among the plaintiffs bringing this action are American scholars, whose academic freedom is vital to the strength of the nation. In *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), the Court spoke to the First Amendment's special protection for academic freedom:

> Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' (Citation omitted).

Debate, discussion, and the testing of ideas stand at the center of the search for truth and understanding. Several recent decisions, drawing on *Keyishian* and the earlier views of Justice Frankfurter, *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1951), reflect the Court's continuing concern for academic freedom. Writing for eight members of the Court in *Regents of the University of Michigan v. Ewing*, 106 S. Ct. 507, 514 (1985), Justice Stevens stressed the Court's special responsibilities

under the First Amendment toward academic freedom. Justice Powell, concurring in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312-314 (1978), spoke of the ways in which diversity enriches scholarship and learning. He drew support from, in addition to *Keyishian* and *Sweezy*, a passage about legal education in *Sweatt v. Painter*, 339 U.S 629, 634 (1950), which has the same force in the context of this case:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Isolation and censorship are antithetical to understanding and progress. The Court has observed that the protection of debate in educational settings merits especially careful protection "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). *See also Board of Education v. Pico*, 457 U.S. 853 (1982); *Shelton v. Tucker*, 364 U.S. 479, 485-87 (1960).

The government's interpretation of § 212(a)(27) makes a mockery of these values, by denying Americans the opportunity for direct contact with foreign scholars and other visitors solely because those invited have ideas and affiliations in official disfavor with the government. The United States is left in the anomalous position of championing, in the abstract, the freedom of speakers and audiences while at the same time barring their direct contact.

II. Sending Foreign Policy Messages of Disapproval Is Not A Sufficient Rationale for Infringement of Academic Freedom.

The government and Judge Bork in dissent rely heavily on *Kleindienst v. Mandel* for the proposition that the Court must defer to a "facially legitimate and bona fide reason" proffered for government foreign policy actions which impair citizens' fundamental interests. Cert. Pet. 17, 60a. Yet the justification put forward for the instant visa denials is insufficient under either the limited *Kleindienst* standard, itself of questionable vitality, or a more exacting standard.

a) Signaling disapproval is not a facially legitimate rationale.

The reason the government advances for the visa denials is essentially identical to rationales which this Court has rejected in earlier cases. The explanations given by then-Under Secretary of State for Political Affairs Lawrence S. Eagleburger, in unclassified and declassified affidavits, were based on the notion that by granting or denying a visa the United States can signal its disapproval of certain policies. Judge Bork quoted from an unclassified affidavit:

> [T]he issuance, denial or revocation of a NIV to a particular alien can have significant diplomatic or foreign policy ramifications to the extent that the issuance or denial *is construed* as an act of the United States Government. Thus, for example, the issuance or denial of a visa to a foreign government official *may be taken* by the alien's government as a reflection of United States foreign policy vis-a-vis that government and may result in reciprocal action or retaliation by that government. Similarly, the denial of visas to foreign government officials is one of the tools available to a government to communicate its attitude about the policies of other states.

785 F.2d at 1076 (emphasis added) (J.A. 57-58). In the declassified affidavits Eagleburger stated that a visa de-

nial is "viewed by other Central American countries as reflecting United States foreign policy orientation," and that granting a visa would have "sent a very wrong message." Pet. App. 86a, 87a. A visa denial, he suggests, avoids conferring "the aura of legitimacy" on the alien's government. Pet. App. 90a.

In short, the asserted basis for exclusion involves no suggestion that the applicants would engage in activities harmful to the United States nor create any risk to the national security. The government rather taints our ability to defend ourselves as an open society by turning the exclusion of selected individuals into an official symbol. Contending that this provides a facially legitimate and bona fide reason under *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the government argues that this Court must defer to its decisions. Brief for Pet. at 33. Yet the Court has soundly rejected a "signalling" rationale as justifying abridgement of First Amendment rights in analogous contexts. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court struck down a state university's denial of the use of campus facilities to a student religious group. Non-religious student groups received access to the facilities, but the university argued that providing access to the religious group would amount to an endorsement of the group's purposes, in violation of the Establishment Clause. Justice Powell, writing for seven members of the Court, expressly rejected the notion that access made available on a neutral basis could be construed as an official endorsement, stating that "an open forum in a public university does not confer any imprimatur of State approval" on the groups availing themselves of access. 454 U.S. at 273, 274. A neutral policy of access, protecting the First Amendment rights of American scholars and other citizens, would not of its own force suggest official endorsement of any alien's views.

Healy v. James, 408 U.S. 169 (1972), also counsels against construing access as endorsement. In *Healy*, the Court found unconstitutional a state college's denial of official recognition to a local chapter of Students for a Democratic Society. The college had argued that, although withholding its official "stamp of approval," it posed no obstacle to this group's leafletting and meetings off of the campus. The college president's unwillingness to "sanction" the principles of the organization through official recognition gave the Court little pause. The First Amendment does not immunize governmental actions undertaken to signal disapproval, and Justice Powell's majority opinion observes that the college, "acting here as an instrumentality of the State, may not reject speech or association simply because it finds the views expressed by any group to be abhorrent." 408 U.S. at 187-88.

A brief but significant moment in the history of Harvard University also illustrates the danger of treating individual belief and speech as a vehicle for expression of institutional policy. In 1917 President Lowell rejected suggestions that a pro-German professor be dismissed from the faculty, stating that responsibility for the public statements of its professors would not be assumed by the institution. To do otherwise would be unwise, Lowell explained, because once done the institution would thereafter assume responsibility for all that it permitted the faculty to say.[10] More recently, AAUP responded to instances in which audience disruption forced cancellation of campus speeches by the United States Ambassador to the United Nations by invoking the principle that access to an open forum implies neither agreement nor disagreement with what is said.[11] A policy of neutrality deflates arguments that would attribute views

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[10] W. Metzger, Academic Freedom in the Age of the University 228-29 (1955).

[11] The Chronicle of Higher Education, April 6, 1983, at 11.

of the individual to the institution. Thus a politically neutral non-immigrant visa system, respecting citizens' access to ideas, could not be construed as official endorsement of the beliefs of those allowed entry. Conversely, a visa system burdening citizens' rights only to signal official disapproval lacks facial legitimacy under *Kleindienst.*

b) The message of disapproval is vague and ambiguous.

The foreign policy message supposedly conveyed by the visa denials at issue is itself vague and ambiguous. The actual experience of the four visa applicants and *Healy v. James*, 408 U.S. 169 (1972), discussing "guilt by association," both demonstrate the shallow content of the message.

At least three of the four guests invited by the plaintiffs received visas to travel in the United States either before or after the denials at issue.[12] In light of this inconsistency the government's purported message of disapproval can hardly be viewed as "an important tool of foreign policy," as petitioner's brief would have it. At 36.

Assuming *arguendo* the legitimacy of basing visa denials on political beliefs to convey a message, any message that can be discerned here is itself amorphous. *Healy v. James*, 408 U.S. 169 (1972), underscores this point. The college president in *Healy*, aware that some SDS chapters elsewhere had been associated with violent acts, considered the affiliation of the local group with the organization to be a sufficient basis for denial of recognition. The Court refused to endorse such "guilt by association", without an individualized showing that the association posed the threat feared by the government. 408 U.S. at 186. Here the government has offered little

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[12] *Hearings on Exclusion and Deportation Amendments, supra* n.3 at 167 (1975).

to support its assertion that excluding an alien will send a message of disapproval. The process of visa denials under § 212(a)(27) is most often secret, raising real questions about how a message will be conveyed; to whom it will go; and which of the applicant's various beliefs and associations will be viewed as the one giving offense.

c) The government has suitable alternatives while the would-be hosts do not.

The offensive use of visa denials is an insignificant means among the many at the government's disposal for conveying official foreign policy positions. *Kleindienst* would make examination of these alternatives irrelevant, but amici submit that *Kleindienst* itself should be limited or overruled.

The divided and questionable resolution of *Kleindienst* may be read as grounded on the past visa abuses of the applicant. A history of such abuse might indeed be a facially legitimate rationale for a later visa denial. The Court should allay the "general sense of judicial confusion" [13] arising from *Kleindienst* and reassert the vitality of the First Amendment where the rights of citizens are infringed in the name of foreign policy. See *Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (opinion of Brennan, J.) (considerable discretion vested in state and local authorities does not preclude scrutiny under First Amendment). While the Court is perhaps not well-equipped to judge the substance of foreign policy decisions, matters of foreign affairs are not therefore wholly beyond its reach. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 55 U.S.L.W. 4313 (March 10, 1987); *Japan Whaling Ass'n v. American Cetacean Society*, 106 S. Ct. 2860, 2866 (1986). As one commentator has observed, "by guaranteeing that the power to

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[13] S. Shapiro, *Commentary, Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930, 936 (1987).

shape foreign policy does not also include the power to shape foreign policy debate, the courts are arguably promoting important separation of powers principles." [14]

Eliminating the practice of denying visas on the grounds of the applicant's ideology would hardly hinder the government's ability to convey its foreign policy concerns. The government is well situated to express its disagreement with the visitor's views to the American hosts, the visitor's government, neighboring countries, or elsewhere, through many avenues of communication. The President, the Secretary of State, and American ambassadors and foreign service officers around the globe are available directly to convey official views orally and in writing. In light of the country's extensive foreign policy apparatus, surely the strength of our international position does not turn on a handful of visa denials to which the government has over zealously attached a symbolic meaning.

For the would-be hosts, satisfactory alternatives to face-to-face contact with invited aliens are not available. Denying entry to the visitors works a serious hardship on the hosts' receipt of ideas and information. As acknowledged by the district court, it is no answer to say that mail and other means of communication provide a suitable substitute for face-to-face contact with the excluded invitees. Pet. App. 76a. As the Court observed in *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972), "[t]his argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning." Personal contact is indispensable to political and academic discussion and debate. As Einstein said in accepting an invitation to lecture at the University of Leiden, "[i]n these unfinished things, people understand one another with difficulty unless talking face

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[14] *Id.* at 944-45.

to face." [15] The record in this case [16] reinforces the point made by J. S. Mill's *Essay on Liberty*. For one who seeks to explore the truth of his own beliefs, countervailing points of view must be brought

> into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.

43 *American State Papers* 284 (1952). Mill's point carries special force in the particular setting of this case. Because the government has a superior ability otherwise to "represent" what is going on abroad, to curtail travel outside the country, and to control the flow of ideas in other ways, it is even more imperative that citizens' access to persons willing and able to respond to their invitations to meet with them and to confront them here in the United States be preserved.

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[15] *Developments in the Law—National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1154 (1972).

[16] The Declaration of Thomas H. Holloway, a faculty member at Cornell University, states:

> In keeping with the principles of academic freedom, exchange of ideas, and open debate, learning of the views of these speakers through impersonal means is an inadequate substitute for face-to-face contact. Speakers are not invited to deliver information to passive audiences, but to raise issues for discussion. Such a purpose can only be fulfilled by bringing speakers and audience together in direct personal contact.

Para. 5 (page 237 in the court of appeals appendix).

CONCLUSION

Amici urge the Court to constrain the government's sweeping interpretation of the law which, in the name of plenary executive authority in foreign policy, infringes freedoms of debate and discussion protected by the First Amendment.

Respectfully submitted,

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE COMMITTEES ON IMMIGRATION AND NATIONALITY LAW AND INTERNATIONAL HUMAN RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-656

RONALD W. REAGAN, *et al.*,

Petitioners,

—v.—

JAMES ABOUREZK, *et al.*,

Respondents.

GEORGE P. SHULTZ, *et al.*,

Petitioners,

—v.—

CITY OF NEW YORK, *et al.*,

Respondents.

GEORGE P. SHULTZ, *et al.*,

Petitioners,

—v.—

BRUCE CRONIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE COMMITTEES ON IMMIGRATION AND NATIONALITY LAW AND INTERNATIONAL HUMAN RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

STATEMENT OF INTEREST

This brief *amicus curiae* is submitted with the consent of the parties, pursuant to Rule 36 of the Rules of this Court, on behalf of the Committee on Immigration and Nationality Law and the Committee on International Human Rights (the "Committees") of the Association of the Bar of the City of New York (the "Association"), and in support of respondents. The Association is a not-for-profit corporation formed in 1871. Its original corporate charter, adopted by the New York State Legislature (L. 1871, c. 819), states that the purposes of the Association include, *inter alia*, "cultivating the science of jurisprudence, promoting reforms in the law, [and] facilitating and improving the administration of justice . . . ."

The Committees are dedicated to the thorough analysis and correct interpretation of the immigration laws in a manner that is consistent with the First Amendment right to receive information and ideas and with international instruments promoting the free international exchange of information and ideas. The issue posed in this case is whether Section 212(a)(27) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1182(a)(27), should be interpreted to mean that visas may be denied on purely ideological grounds in violation of First Amendment rights and international law.

This brief is submitted to demonstrate that a thorough and proper analysis of Section 212(a)(27) shows that the statute does not authorize the denial of visas on purely ideological grounds. An alternative interpretation of this statute would result in a deprivation of First Amendment rights on purely ideological grounds, a step far beyond the limited restrictions on First Amendment rights the Supreme Court has allowed to date. The denial of visas on purely ideological grounds would also violate international commitments undertaken by the United States to promote the free exchange of information and ideas.

SUMMARY OF ARGUMENT

The proper statutory interpretation of 8 U.S.C. § 1182(a)(27) (Immigration and Nationality Act, "I.N.A.", the "Act", Sec. 212(a)(27)) requires affirmative answers to the two questions presented for review by this Court. The proper interpretation of I.N.A. Sec. 212(a)(27) upholds basic First Amendment rights and adheres to important international law principles to which the United States is formally committed regarding the free exchange of information and ideas.

Not only does a plain reading of the language of the statute result in a positive response to the first question; the legislative history of Section 212(a)(27) and its predecessor statute further confirms that the subsection only permits denial of a visa to an alien if his "activities", not his mere "presence or entry", would prejudice the public interest. A thorough review of this legislative history shows that the prevention of the use of diplomatic status as a "screen" for "subversive activity" represents the basic purpose of Section 212(a)(27).

Administrative construction of the statute provides further support for respondents' position that mere "presence or entry" is insufficient to justify the denial of a visa. The Attorney General, through decisions by the Board of Immigration Appeals, has insisted that a finding of inadmissibility under Section 212(a)(27) be only on the basis of "activities". The State Department, which must follow the Attorney General on matters of law concerning visa eligibility, has underlined in its internal guidelines the critical importance of the threat of "activities" by a visa applicant.

Visa ineligibility under Section 212(a)(27) must be considered independently of visa ineligibility under Section 212(a)(28). To hold otherwise would evade the purpose of the McGovern Amendment which provides that the State Department should approve the nonimmigrant visa application of an alien who is excludable only because of his membership in or affiliation with a proscribed organization unless the admission of such alien would pose a threat to

United States "security interests." The reasoning of the court below on this issue is further supported by the statutory waiver provisions and the State Department's internal practice, as illustrated in the Foreign Affairs Manual.

An alternative construction of Section 212(a)(27) would not only be inaccurate; it would also violate this Court's interpretation of fundamental First Amendment rights and conflict with universally recognized principles promoting the free international exchange of information and ideas.

As recognized in *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972), First Amendment rights are implicated when, as in the instant case, American citizens invite aliens to speak publicly in the United States and engage in "face-to-face debate". The refusal of visas to Tomas Borge, Nino Pasti, Olga Finlay and Leonor Rodriguez Lezcano has prevented the free exchange of ideas and violated respondents' rights to receive information. Nor is there any sufficiently compelling countervailing governmental interest to justify the restriction of the First Amendment rights at issue in this case.

The misapplication of Section 212(a)(27) in the past has led to the unconstitutional pattern of denying visas on purely ideological grounds, as discussed in the March, 1984 *Report on Visa Denials on Ideological Grounds: An Update* by the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York ("Immigration Committee Report"). The correct interpretation will end this unconstitutional pattern. When, as in the instant case, " 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided . . . a court should adopt that construction'." *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979).

In the alternative, if this Court is swayed by petitioners' position on the interpretation of Section 212(a)(27), then the Court should strike that subsection as unconstitutionally vague and overbroad. The government may only regulate in the free speech area with "narrow specificity." *NAACP v. Button*, 371 U.S. 415 (1963). Nor is it permissible for the government "unduly to infringe [a] protected

freedom." *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

The denial of a visa application on solely ideological grounds would violate major international instruments such as the United Nations Charter and the Universal Declaration of Human Rights which encourage and affirm the need for the free international exchange of information and ideas. Such a denial would further conflict with the obligations of the United States under the Helsinki Final Act to "facilitate the freer and wider dissemination of information of all kinds." The Court should attempt to construe the statute, if fairly possible, to avoid such conflict.

ARGUMENT

I

THE PLAIN MEANING, LEGISLATIVE HISTORY AND ADMINISTRATIVE CONSTRUCTION OF SECTION 212(a)(27) SHOW THAT A VISA CAN BE DENIED ONLY IF THE ALIEN'S "ACTIVITIES" WOULD BE PREJUDICIAL TO THE PUBLIC INTEREST

A. The Plain Language Of The Statute Supports Respondents' Position That Only "Activities", Not Mere "Presence Or Entry", Can Provide The Basis For Denial Of A Visa Or Application For Admission Under Section 212(a)(27)

The Immigration and Nationality Act ("I.N.A.", the "Act") provides:

> SEC. 212, 8 U.S.C. 1182. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States . . .
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public

> interest, or endanger the welfare, safety, or security of the United States. . . .

Ineligibility "to receive visas" refers to the action of the consular officer at the foreign post in response to an application for a visa. I.N.A., Sec. 221(g). To be "excluded from admission" refers to the action of the Attorney General (acting through immigration officers at the port of entry) in inspecting the visa holder and making an independent determination of admissibility. I.N.A., Sec. 221(h).

Noting that the statute does not speak of "presence" as a basis for exclusion, the court below found that the "plain thrust of the language of subsection (27)", as measured by traditional canons of statutory construction, supported respondents' position that denial of a visa or application for admission under 212(a)(27) can be only on the basis of "activities", not on the basis of mere "presence". *Abourezk v. Reagan*, 785 F.2d 1043, 1054 (D.C. Cir. 1986).

Justice Scalia has recently referred, with approval, to "the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity." He continued: "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." *I.N.S. v. Cardoza-Fonseca*, No. 85-782, ____ U.S. ____ (1987) (Scalia, J., concurring).

The "venerable principle" cited by Justice Scalia should guide this Court in its approach to I.N.A., Sec. 212(a)(27), which prohibits the admission of an alien who seeks to enter the United States "solely, principally, or incidentally *to engage in activities* which would be prejudicial to the public interest . . ." (emphasis added). Unless Congress now wishes to amend the statute, by adding after the quoted language, "or whose presence in or entry into the United States would be prejudicial to the public interest," the decisions of consular officers or of the Attorney General (acting through immigration officers at the port of entry) should adhere to the plain language of the statute, and should focus on the planned or probable "activi-

ties" that an applicant for a visa or for admission would undertake in the United States.

B. The Legislative History Of Section 212(a)(27) Confirms That Its Core Purpose Was To Deny Visas To Diplomats Who Would Use Those Visas To Enter The United States In Order To Engage In "Subversive Activity"

The "prejudicial to the public interest" language of Section 212(a)(27) of the Immigration and Nationality Act is derived from the language of a predecessor statute, the Internal Security Act of 1950, Sec. 22(1), 64 Stat. 987, 1006 (repealed 1952). The 1952 statute made one change in replacing "or would endanger the welfare or safety of the United States" with "or would endanger the welfare, safety, or *security* of the United States" (emphasis added).

The legislative history of the predecessor of 212(a)(27) shows clearly that its core purpose was to deny visas to diplomats from "Iron Curtain" countries who, it was feared, would use those visas to enter the United States and then engage in "overt acts endangering the public safety." 96 Cong. Rec. 14179 (1950). In presenting to the Senate a section-by-section analysis of the bill, Senator Pat McCarran, the bill's chief sponsor, described the predecessor to 212(a)(27) as aimed at "overt acts":

> The first provision would require the exclusion and deportation of all aliens irrespective of their status if they seek entry to engage or engage after entry in activities endangering the public safety. . . . Mr. President, in those cases in which aliens in diplomatic status seek to enter the United States to engage in or are caught engaging in espionage, sabotage, or other overt acts endangering the public safety, they will be subject to exclusion or deportation.

It was the use of diplomatic status as a "screen" for "subversive activity" that was the prime target of the Internal Security Act's predecessor to I.N.A., Sec. 212(a)(27), 96 Cong. Rec. 14180 (1950):

> The bill will permit Communists to enter the country, so long as they come here for diplomatic business, and so long as they confine themselves to the usual and reasonable activities of a diplomat. What the bill will do, which is not possible under present law, is to permit the deportation of a Communist who comes here under diplomatic or semidiplomatic status and then uses that status as a screen behind which to carry on subversive activity.

Senator McCarran's clear and repeated explanation to the Senate of the purpose of the predecessor to 212(a)(27) indicates Congress' specific intent with respect to its meaning when it adopted the Internal Security Act of 1950—the full title of which, it should be recalled, was "The *Subversive Activities* Control Act of 1950" (emphasis added). In such a case, the Court only "enforces that intent" and has no need to look to administrative construction of the statute. *Abourezk*, *supra*, at 1053, citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The unambiguous statement by Senator McCarran that the purpose of the predecessor to 212(a)(27) was to prevent the granting of a visa or admission to an alien whose purpose it was to engage in subversive activity subsequent to entry is confirmed by the House Report, two Senate Reports, and the Conference Committee Report.[1] The first of the two Senate Reports (S. Rep. No. 2230, 81st Cong., 2d Sess. 5 (1950)), to accompany the bill entitled "Exclusion and Expulsion of Subversive Aliens from the United States," stated that its purpose was "to strengthen the provisions of existing law which [*sic*] respect to the exclusion and deportation of subversive aliens." The Senate's overriding concern with the "activities" that such

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1 H.R. Rep. No. 2980, 81st Cong., 2d Sess. 1 (1950); S. Rep. No. 2230, 81st Cong., 2d Sess. 5 (1950) (to accompany S. 1832, "Exclusion and Expulsion of Subversive Aliens from the United States"); S. Rep. 2369, 81st Cong., 2d Sess. 10 (to accompany S. 4037, the "omnibus bill" entitled "Protecting the Internal Security of the United States"); H.R. Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950) (Conference Committee). The House and Conference Committee Reports are published in U.S. Code Cong. Serv. 1950, pp. 3886, 3899.

aliens might engage in after effecting an entry is highlighted by passages like these (*id.* at 10):

> Agents of communism have used the customary courtesy extended by the United States to representatives of foreign governments, including diplomats, consuls, and other representatives, as a screen behind which to engage in espionage and other activities designed to overthrow our democratic form of government by force and violence.

The House Report (H.R. 2980, 81st Cong., 2d Sess. 1 (1950)), accompanying the bill entitled "Protection of the United States against Un-American and Subversive Activities," expresses a similar concern about the danger to United States "security interests" of "activities . . . carried on by secret and conspiratorial methods," and of "activities" that "constitute an immediate and powerful threat to the security of the United States and to the American way of life." To substantiate this concern, the House Report refers to the hearings that provided "irrefutable evidence" that Communist agents in the United States were "engaged in the training of espionage specialists who are taught to infiltrate and destroy our Government from within." *Id.* at 6.

With respect to Section 22(1) of the Internal Security Act, the Senate Reports refer to the provision as "an admixture of existing law and the new provisions of the bill", and describe "existing law" in this way:

> Under existing law, among the excludable aliens are certain aliens who seek to enter the United States whose entry would be prejudicial to the public interest or would endanger the safety of the United States. The committee has broadened this class of excludable aliens to include those aliens who seek to enter the United States to engage in activities which would endanger the welfare of the United States.

Treating the reference to "entry" under "existing law" as a polar opposite to the reference to "activities" in the new law,

the dissent below argued that the Internal Security Act's predecessor to 212(a)(27) had "broadened" the "existing law" which prohibited only prejudicial "entry" by adding prejudicial "activities". *Abourezk*, *supra*, at 1065.

This interpretation misunderstands the relationship between "existing law" and the Internal Security Act, and misreads the Senate Reports. The Internal Security Act is "broadened" by comparison to "existing law" not to add "activities" to "entry" but to add "or would endanger the welfare . . . of the United States" to "or would endanger the public safety of the United States." The Internal Security Act also prohibits prejudicial "activities" whether they were engaged in "solely, principally, or incidentally"—the latter provision reflecting Senator McCarran's concern about diplomats who might use their status as a "screen" behind which to engage "incidentally" in subversive activity.

The "existing law" referred to in the Senate reports was a 1948 statute entitled "An Act to amend the immigration laws to deny admission to the United States of aliens who may be coming here *for the purpose of engaging in activities* which will endanger the public safety of the United States." 62 Stat. 268 (emphasis added). It would be difficult to imagine a clearer expression of Congressional concern not to prevent "admission" in the abstract, but to prevent an "admission" obtained for the express "purpose" of engaging in harmful "activities". The 1948 statute amended the 1918 immigration law, 40 Stat. 1012, by adding to the inadmissibility of anarchists the inadmissibility of an alien:

> who the Attorney General knows or has reason to believe seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States.

The Senate Reports to the Internal Security Act of 1950 which refer to "existing law" fully understood that "existing law" was directed against "activities", and that the new bill "broadened" the "existing law" to expand the *range* of "activities" that were prohibited. S. Rep. No. 2230, *supra*, at 8

(deletions and additions). The reference in the Reports to "entry" should not be read in the abstract and outside of its historical context as an incorrect assertion that "existing law" permitted a finding of inadmissibility merely if "entry", without either the threat or fact of activities, were prejudicial to the public interest.[2]

This was also the understanding of the Conference Committee, which compared the Internal Security Act to "existing law" in this manner (H.R. Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950)):

> Paragraph (1) provides for the exclusion from the United States of aliens seeking to enter for the purpose of engaging in activities which are prejudicial to the public interest and dangerous to the welfare or safety of the United States, whether or not such aliens seek to enter the United States solely, principally, or incidentally for such purpose. Existing law merely provides for the exclusion of aliens if the Attorney General knows or has reason to believe that such aliens are seeking to enter the United States to engage in activities which would endanger the public safety of the United States.

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2 The dissent, *Abourezk*, *supra*, at 1065, treats the 1948 law as merely an extension to the Attorney General of the authority previously granted to consular officers under a 1941 law prohibiting the grant of a visa to an alien who might be coming to the United States "for the purpose of engaging in activities which will endanger the public safety of the United States." 55 Stat. 252. According to the dissent, the legislative history of the 1941 law indicates that it should be read, despite its specific reference to "activities", to include an "entry" that would endanger the public safety. Even if the dissent were correct in its reading of the 1941 law, that law was not the "existing law" referred to in the Congressional reports to the Internal Security Act of 1950, which concerned the authority of the Attorney General to deny admission. Furthermore, the supremacy of the Attorney General over consular officers and the Department of State in matters of law, I.N.A., Sec. 103(a), reduces, if it does not eliminate, the relevance of any legislative history pertaining to the granting and refusal of visas by consular officers under the 1941 law.

The lower court, after reviewing the Senate Reports that spoke of "entry" and did not specifically mention "activities", and the Conference Committee report that spoke of "activities", concluded that the legislative history was ambiguous and remanded for examination of the administrative practice of visa granting or refusal under 212(a)(27).

C. Administrative Construction Of The Statute By The Attorney General And The State Department Shows That Only "Activities" Can Provide The Basis For Denial Of A Visa Or Application For Admission Under Section 212(a)(27)

The Immigration and Nationality Act provides that the Attorney General "shall be charged with the administration and enforcement of this Act", and that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." I.N.A., Sec. 103(a). The "granting or refusal of visas" is entrusted to consular officers. I.N.A., Sec. 104(a).

Although the application for a visa and its granting or refusal is within the authority of the consular officer, the legal question of visa eligibility is for the Attorney General, not the consular officer or the Department of State, to decide. The separation of functions between the Attorney General and the Department of State is described in the House Report to the Immigration and Nationality Act (H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 35 (1952)) with this illustration:

> For example, rulings which may be issued by the Attorney General relating to the provision of the bill governing the admissibility of aliens will be controlling with respect to a determination of aliens who are admissible and will be binding on the Secretary of State with respect to determinations of whether an alien is eligible for a visa. On the other hand, the Secretary of State will have control over all questions relating to the manner in which the powers, duties, and functions of consular and diplomatic officers are to be administered.

1. Administrative Construction by the Attorney General

Since the enactment of the Immigration and Nationality Act in 1952, three precedent decisions have required administrative construction by the Attorney General of the "prejudicial to the public interest" language of 212(a)(27). In the leading case, *Matter of M-*, 5 I. & N. Dec. 248 (1953), the Board of Immigration Appeals (the "Board") reversed a decision of the Special Inquiry Officer finding a pacifist leader from England excludable on the basis of his intent "incidentally" to engage in "activities" in the United States that would be "prejudicial to the public interest" within the meaning of 212(a)(27). These scheduled "activities" included delivering talks and participating in discussion groups with United States citizens on such subjects as the rearmament of Germany, England's view of the Korean war, nonviolent resistance to apartheid in South Africa, and conditions in Yugoslavia. The applicant's prior conviction for violating the Official Secrets Act of Great Britain in having received secret papers concerning government strategy in India provided a basis for the Special Inquiry Officer's belief that the applicant might engage in "activities" that came within the ambit of 212(a)(27).

The Board first examined the legislative history of 212(a)(27), finding that the provision was directed against "subversives", but that its language was broad enough to include individuals other than "subversives". The Board then examined in some detail the applicant's firmly held pacifist beliefs. It observed that the applicant's views "may be unpopular in the United States, and some of his opinions may be in conflict with policies of his Government." The Board emphasized, however, that the "unpopularity in the United States of the views advocated by a person seeking admission would apparently not be a test of whether admission of the person would be prejudicial to the public interest, for persons who advocate totalitarianism (as long as they do not advocate establishment of a dictatorship in the United States) are admissible under the Immigration and Nationality Act."

The Board stated that the Special Inquiry Officer could not have excluded the applicant on the basis of his opinions and beliefs, but, rather, must have done so as a result of his "fear that a person who places his conscience above the law and who has once received government documents in defiance of the law may engage in activities prejudicial to the best interest of the United States if permitted to enter, and to this is added the thought that his remarks will be critical of United States policies and the consequence of his visit may result in enlarging the group which object[s] to service in the armed forces."

Examining the provisions of the Immigration and Nationality Act that permit aliens who served as non-combatants in the armed forces or performed work of national importance in lieu of armed service to be naturalized (Section 337(a)), and the Supreme Court decision holding that religious pacifists are not barred from holding public office, *Girouard v. United States*, 328 U.S. 61 (1946), the Board concluded that the "activities" of a fervent pacifist cannot be "activities prejudicial to the public interest" within the meaning of 212(a)(27).

Stated narrowly, *Matter of M-* holds that the activities of a pacifist are not "prejudicial to the public interest" within the meaning of the statute. Stated more broadly, the decision stands for the rule that the Board will look not to the opinion or belief of the applicant for admission, but to his probable "activities" in evaluating admissibility under 212(a)(27). If the "activities" are not "prejudicial to the public interest", the alien's admission will not be denied under 212(a)(27). Although the terms "presence or entry" are not used in opposition to "activities," a fair reading of *Matter of M-* is that "presence or entry" alone, distinct from probable "activities prejudicial to the public interest", cannot form the basis for exclusion of the applicant for admission. If the Attorney General has articulated this rule with respect to applicants for admission at the port of entry, that "determination and ruling" should also be implemented by consular officers with respect to the granting or refusal of visas at consular posts. I.N.A., Sec. 103(a).

Matter of M- was followed in *Matter of Rivero-Diaz*, 12 I. & N. Dec. 475 (1967), where the Board sustained the exclusion of

an anti-Castro Cuban national under 212(a)(27) and (29), despite the fact that his "actions" on behalf of his cause "would undoubtedly arouse the sympathy of many United States citizens and would be popular with many opposed to Castro and what he represents," since his record showed that he would probably "continue such prohibited activity" if admitted into the United States.

Showing its concern about the occasional misuse by Special Inquiry Officers of 212(a)(27) as a catch-all for other provisions of the statute, the Board, in *Matter of McDonald and Brewster*, 15 I. & N. Dec. 203 (1975), found that the "activities prejudicial to the public interest" language could not be applied to cover the importation for personal use of several marijuana cigarettes, properly prohibited under a separate section of the Act. The Board there cited an earlier unpublished decision, *Matter of Zamora*, A-10550431 (March 11, 1958), in which it had held 212(a)(27) inapplicable to a case involving conspiracy to smuggle aliens into the United States, which was properly prohibited under a separate section of the Act.[3]

In all three precedent decisions rendered by the Board, and in the non-precedent decision cited by the Board in *Matter of McDonald and Brewster*, it is "activities", not mere "presence or entry", that trigger the "prejudicial to the public interest" language of the statute. And the Board is scrupulously careful in disallowing use of 212(a)(27) where a separate provision of the statute may properly be applied.

2. Administrative Construction by the State Department

The State Department, in its Foreign Affairs Manual, has provided guidance to its consular officers in the form of "illustrations" with respect to the granting or refusal of visas under 212(a)(27). Foreign Affairs Manual, Pt. II ("F.A.M."),

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3 The Board has not maintained an Index of unpublished decisions for the period prior to 1966; its Index of unpublished decisions covering the period from 1966 to the present does not reveal any decision addressing 212(a)(27) inadmissibility.

§ 41.91(a)(27), reprinted in Gordon & Rosenfield, *Immigration Law & Procedure* ("G & R") 32-214.18 (1985).

The first three illustrations point clearly to the threat of "activities" of a conspiratorial, terrorist, or underworld character, and are in accord with the Attorney General's construction of the statute in *Matter of M-*, *supra*. The fourth illustration does not refer directly to the threat of activities subsequent to entry, but refers in the present tense to aliens who "are notorious" for actions that include "physical brutality while in political power in their native land. . . ."

The Act requires that instructions to consular officers promulgated by the State Department be consistent with the "determination and ruling" of the Attorney General. I.N.A., Sec. 103(a). In order for the fourth illustration to be consistent with the Attorney General's construction of the statute in *Matter of M-*, *supra*, it should be read to include the requirement that the consular officer believe that the "notorious" perpetrator of abuses who is applying for a visa might engage in harmful activities subsequent to entry.

But even if the fourth illustration in the Foreign Affairs Manual is read without this gloss, it should be confined by its plain meaning to aliens whose notoriety is based upon "excesses including physical brutality" while in power. The language of the illustration makes it clear that the State Department is instructing its consular officers to refuse a visa to a government agent or former agent whose conduct in power is or was shocking to the conscience of humanity. Indeed, the Department's actual practice confirms this narrow reading: the one example that the State Department offered to the court below of its use of the fourth illustration was the refusal of a visa to a former Nazi SS officer. *Abourezk*, *supra*, at 1056.

By its terms, and to remain consistent with the Attorney General's "determination and ruling" and with the statute, the fourth illustration cannot be "stretched" to cover a visa refusal to respondents, especially where the First Amendment rights of United States citizens are implicated.

II

THE McGOVERN AMENDMENT, THE WAIVER PROVISIONS OF THE ACT, AND THE FOREIGN AFFAIRS MANUAL SUPPORT THE COURT'S HOLDING THAT VISA-INELIGIBILITY UNDER 212(a)(27) SHOULD BE CONSIDERED INDEPENDENTLY OF 212(a)(28) INELIGIBILITY

The appellate court held that visa ineligibility under 212(a)(27) must be considered independently of visa ineligibility under (28), since "homogenization" of the two subsections would "evade" the purpose of the McGovern Amendment, 22 U.S.C. Sec. 2691(a)(1982). *Abourezk*, *supra*, at 1057.

In addition to the requirements of the McGovern Amendment, the court's reasoning is supported by examination of the Act's waiver provisions for 212(a)(28) ineligibility and the State Department's Foreign Affairs Manual.

A. The Statutory Waiver Scheme

The "prejudicial to the public interest" language of 212(a)(27) does not appear at any point in 212(a)(28), but its counterpart, "admission . . . in the public interest", does: exemption from ineligibility to receive a visa and be admitted into the United States may be granted if certain extenuating circumstances of membership in a proscribed organization are shown, and if both the Secretary of State and the Attorney General concur that "admission of such alien into the United States would be in the public interest." I.N.A., Sec. 212(a)(28)(I). It is the Attorney General, not the Secretary of State, who makes the final determination concerning admissibility, and where he determines that an alien presumptively ineligible under 212(a)(28) shall be admitted, he must "promptly make a detailed report to the Congress."

The opposing of "prejudicial to the public interest" in 212(a)(27) as the basis for refusal of a visa and of the application for admission, and of "admission . . . in the public interest" where an exemption from 212(a)(28) ineligibil-

ity is concerned, indicates that there is a statutory presumption that admission of an alien who is a member of a proscribed organization is "contrary to" or "prejudicial to the public interest." That presumption can be rebutted under the Act by the joint recommendations and findings of the Secretary of State and the Attorney General, and it is now rebutted by the McGovern Amendment. The statutory scheme supports the statement of the court in *Allende v. Shultz*, 605 F. Supp. 1220 (D. Mass. 1985), that, whatever 212(a)(27)'s "prejudicial to the public interest" language includes, it does not include any of the ineligibility grounds of subsection (28).

The Act further provides that the consular officer or Secretary of State may recommend to the Attorney General that an alien who is ineligible to receive a visa and be admitted into the United States under any of the provisions of 212(a) except for 212(a)(27), (29) (saboteur), or (33) (Nazi persecutor) be granted a visa and admitted despite his inadmissibility, and the Attorney General may admit him in his discretion. I.N.A., Sec. 212(d)(3), 22 C.F.R. § 41.95. 8 C.F.R. § 212.7.

The strikingly different statutory treatment of 212(a)(27) and (28)—providing several kinds of "forgiveness" for membership in or affiliation with a prohibited organization but none for an intention to enter the United States for the purpose of engaging in "subversive activities"—argues strongly that the "foreign policy concerns" that might affect a determination of inadmissibility under 212(a)(27) be considered entirely apart from and "independent of" the question of 212(a)(28) ineligibility.

B. The State Department's Foreign Affairs Manual

With respect to the consideration of visa eligibility under 212(a)(27), the State Department's Foreign Affairs Manual provides:

> It was the intent of Congress that the provisions of paragraph (27) of Section 212(a) of the Act be used to safeguard the security of the United States. They must not be used as "catch-all" provisions for refusing visas in cases which do not fit in other paragraphs of Section 212(a).

F.A.M., § 41.91(a)(27), reprinted in G & R, 32-214.18 (1985).

The State Department's directive to consular officers to confine 212(a)(27) to "security" cases and to bar its use as a "catch-all" provision supports the lower court's holding that 212(a)(27) and (28) ineligibility be considered independently. Additional support is found in the State Department's differing practices on the provision of advisory opinions to consular officers. Where 212(a)(27) ineligibility is involved, the consular officer must obtain an advisory opinion from the Department to assure that "uniform" and "consistent" determinations of such applications will be made. F.A.M., § 41.91(a)(27), G & R, 32-214.18 (1985). No such advisory opinion is required where a visa applicant appears to be ineligible under 212(a)(28) (an advisory opinion is required only on the question of whether membership in a proscribed organization was "non-meaningful", F.A.M., § 41.9(a)(28), G & R, 32-218 (1979)).

The implication of this differing treatment is that ineligibility under 212(a)(28) is a relatively routine matter that the consular officer can decide without guidance from his superiors in the Department, except on the subtle legal question of "non-meaningful" membership. By contrast, the question of what activities are "prejudicial to the public interest" is a complex matter that requires that the consular officer presented with the application seek guidance from the Department. The State Department's own line-drawing between the two subsections argues that it should consider ineligibility under one independently of ineligibility under the other.

III

THE STATE DEPARTMENT'S DENIAL OF VISAS TO TOMAS BORGE, NINO PASTI, OLGA FINLAY AND LEONOR RODRIGUEZ LEZCANO VIOLATES RESPONDENTS' FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION AND IDEAS

This case confronts the Court not only with questions of statutory interpretation, but also with broader constitutional issues. When government action pursuant to Sections 212(a)(27) and (28) of the Immigration and Nationality Act

conflicts with the fundamental First Amendment rights of American citizens, those rights must prevail unless there is a compelling governmental interest. There is no such interest here, and, therefore, the statutory provisions at issue should be ruled unconstitutional as applied.

A. The First Amendment Protects The Right To Receive Information And Ideas

In *Kleindienst*, *supra*, at 765, this Court recognized that First Amendment rights are implicated when American citizens invite aliens to visit this country to speak publicly and engage in "face-to-face debate".[4] In the instant case, the District Court reached the same conclusion, relying on this Court's decisions holding that "the First Amendment protects not only speech but also the right to receive information and ideas." *Abourezk v. Reagan*, 592 F. Supp. 880, 886 n. 18 (D.D.C. 1984).

Five years ago, in *Board of Education v. Pico*, 457 U.S. 853 (1982), this Court stirringly reaffirmed that basic principle, proclaiming that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." 457 U.S. at 867 (emphasis in original). The *Pico* Court explicitly rejected the Board of Education's claim of absolute discretion to remove books from school libraries, flatly stating that "[o]ur Constitution does not permit the official suppression of *ideas*." *Id.* at 871 (emphasis in original).

We submit that, at its core, the instant case is about exactly that—the official suppression of ideas. As Justice Douglas eloquently stated in *Kleindienst*:

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4 Although Dr. Ernest Mandel, a Belgian journalist and Marxist theoretician, was excludable under 212(a)(28), the Attorney General's denial of a waiver stemmed from his violation of the terms of his visa on a previous visit, when he allegedly engaged in unauthorized fund raising activity. Hence, his denial can be distinguished from those at issue here because it was not content-based. *Kleindienst*, *supra*, at 758-59.

> Thought control is not within the competence of any branch of government. Those who live here may need exposure to the ideas of people of many faiths and many creeds to further their education. We should construe the Act generously by that First Amendment standard. . . .

Kleindienst, *supra*, at 772 (Douglas, J., dissenting).

The denial of visas to Borge, Pasti, Finlay and Lezcano has unquestionably interfered with the free interchange of ideas and with respondents' rights to receive information. Therefore, the question before this Court is not merely whether those denials were statutorily proper, but also whether they were constitutionally permissible. We submit they were not.

B. The Government May Restrict First Amendment Rights Only If The Restriction is Necessary To Further A Compelling Governmental Interest, And There Is No Such Interest In This Case

Although the question of the admission or exclusion of aliens has traditionally not been the province of the judicial branch, "[w]hen Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is [the judiciary's] 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." *United States v. Robel*, 389 U.S. 258, 264 (1967). As Justice Marshall pointed out in *Kleindienst*, "all governmental power . . . is limited by the Bill of Rights." *Kleindienst*, *supra*, at 782-783 (Marshall, J., dissenting).

We do not challenge the executive branch's authority to exclude individuals who would engage in criminal or subversive activities upon entry to the United States. However, when the executive's exclusion of an alien is based on beliefs and affiliations rather than on anticipated participation in harmful activities, that exclusion amounts to a prior restraint of the free speech rights of the alien's prospective audiences. According to this Court, "the First Amendment tolerates absolutely no prior judicial restraints . . . predicated upon surmise or conjecture that untoward consequences may result." *New York Times Co. v. United States*, 403 U.S. 713, 725-26 (1971) (Brennan, J.,

concurring). That case, the "Pentagon Papers" case, concerned prior restraint of the press, but the same basic principle should apply here. The ideological exclusion of Borge, Pasti, Finlay and Lezcano serves no compelling government interest; in fact, it does not even serve a valid government interest. Our government is constitutionally prohibited from placing limitations on the opportunity of American citizens to be exposed to ideas. *See Lamont v. Postmaster General*, 381 U.S. 301 (1965).

This Court has not yet been called upon to decide a case involving a constitutional challenge to 212(a)(27). When this Court earlier confronted a challenge to the constitutionality of 212(a)(28) it decided the case on the narrow ground that the plaintiffs—United States citizens who had invited the alien to give a speech—could not compel the Attorney General to grant the alien a waiver of visa ineligibility under I.N.A., Sec. 212(d)(3) when the alien had violated terms of a previous waiver. *Kleindienst*, *supra*, at 769 (1972).

In the case at bar, by contrast, we do not urge that the United States citizens who invited the aliens have the power to require the Attorney General to grant a waiver of inadmissibility—indeed, no waiver is provided for Section 212(a)(27) inadmissibility. Rather, we maintain that the government's use of Section 212(a)(27) in place of 212(a)(28) has enabled it to refuse visas on the basis of its wish to silence discussion of matters of public interest and concern. We further maintain that the State Department has flouted the Attorney General's holding in *Matter of M—*, *supra*, that a determination of inadmissibility on the basis of the applicant's expression of "unpopular" opinion is contrary to Section 212(a)(27).

The Board of Immigration Appeals has no authority to determine a constitutional question, *Baques-Valles v. I.N.S.*, 779 F.2d 483 (9th Cir. 1985), and made no such determination in *Matter of M—*. This Court does have that authority. We urge this Court to hold that the visa refusals in this case were not only violative of the statute, but violative of the First Amendment rights of the United States citizen respondents.

C. Section 212(a)(27) Is Inconsistent And Incompatible With This Court's Interpretation Of The First Amendment

Three years ago, the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York prepared a detailed report on the exclusion provisions of Sections 212(a)(27) and (28). *See* p. 4, *supra*. Apart from the question of their constitutionality, the report found that the government's exclusions under Sections 212(a)(27) and (28) have damaged our nation's intellectual, cultural, and political life and marred our moral image, here and abroad. The Committee concluded:

> [W]e believe that denials of visas based solely on the applicants' alleged political beliefs or affiliations have no place in our immigration laws. It is incongruous to exclude advocates of Communist or other ideologies when their domestic counterparts run for public office and enjoy the right of free speech, and hypocritical to do so while we boast and even preach of that domestic freedom.

Immigration Committee Report at 19.

This conclusion is consistent with the role this Court has attributed to the First Amendment's free speech guarantee in safeguarding and promoting American democracy. Throughout its history, the Court has praised the ideal of "free trade in ideas" on numerous occasions. *See, e.g., Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, ____ U.S. ____, 107 S. Ct. 616 (1986). Twenty-three years ago, Justice Brennan acknowledged our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . " *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Perhaps the most eloquent tribute to the First Amendment as the guarantor of American self-government was written sixty years ago by Justice Brandeis, who proclaimed:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative

> forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

This basic proposition reflects the shared beliefs of the American public. To exclude such aliens, we submit, underestimates the American people and offends this country's free-speech traditions. Consequently, such exclusions should no longer be tolerated.

D. Section 212(a)(27) Is Unconstitutionally Vague And Overbroad

1. Vagueness

A statute may be considered void for vagueness when it " 'either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application'." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (citing and quoting from *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). In the free speech area, this Court has stated that "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with *narrow specificity*." *NAACP*, *supra*, at 433 (emphasis added).

It has already been shown that Section 212(a)(27) of the Immigration and Nationality Act implicates the First Amendment rights of Americans who invite aliens to visit this country to speak publicly. *See* Section IIIA, *supra*. We contend that to

the extent this statute encompasses aliens seeking to enter the United States "solely, principally or incidentally to engage in activities . . . prejudicial to the public interest", it is unconstitutionally vague. It chills the rights of Americans to plan programs with the participation of aliens by failing to define what sort of activities will be considered "prejudicial to the public interest", or to explain how an individual can "incidentally" engage in such activities. These are fatal flaws, and Section 212(a)(27) should therefore be struck down as void for vagueness.

2. Overbreadth

This Court has held that the government's "power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell*, *supra*, at 304.

The protected freedom affected by Section 212(a)(27) is the First Amendment freedom to receive information and ideas. *See* Section IIIA, *supra*. Since the statute has been interpreted to exclude aliens invited to speak in this country even in cases when there has been no legitimate compelling government interest to do so, it is also unconstitutionally overbroad. *See* Section IIIB, *supra*.

IV

THE STATE DEPARTMENT'S DENIAL OF VISAS ON IDEOLOGICAL GROUNDS IS INCONSISTENT WITH MAJOR INTERNATIONAL INSTRUMENTS

It is a basic canon of statutory construction that statutes should be construed in a manner consistent with international law. Chief Justice Marshall long ago observed that "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. The Charming Betsey*, 6 U.S. (2 Cranch.) 64, 118 (1804). Section 134 of the *Restatement of Foreign Relations Law of the United States* (Rev., Tent. Draft No. 6, April 12, 1985) similarly provides, "[w]here

fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law or with an international agreement of the United States." The government has ignored this principle in its construction of Section 212(a)(27) of the Act.

The United States has subscribed to international instruments that recognize the right of American citizens to receive visitors into our country and hear what they have to say. The most important of these instruments relates to our membership in the United Nations. The United Nations Charter itself, of which the United States was a principal sponsor, provides that a central purpose of the organization is "promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex or religion."[5]

To carry out this mandate, the United Nations in 1948, under the leadership of the United States, adopted the Universal Declaration of Human Rights. Article 19 gave forceful recognition to the "right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information through any media and regardless of frontiers."[6]

The Universal Declaration is no barren philosophical tract. As stated by the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980):

> [A] Declaration creates an expectation of adherence, and 'insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States'. . . . Indeed, several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law.

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5 Charter of the United Nations, Art. 1, § 3.

6 Universal Declaration of Human Rights, signed Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/180 (1948), Art. 19.

The United Nations in 1966 adopted the International Covenant on Civil and Political Rights (the "Civil and Political Covenant").[7] Article 19, paragraph 2 provides:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.

President Carter signed the Civil and Political Covenant and submitted it to the Senate for consent to ratification in 1978. As a result of signing the agreement with a view to ratification, the United States "is obliged to refrain from acts that would defeat the object and purpose of the agreement." *Restatement of Foreign Relations* § 312(3). *Accord* Vienna Convention on the Law of Treaties, Article 2.[8]

The United States is also a signatory to another significant international instrument respecting freedom of speech and travel. The free speech and press provisions of that instrument, the Final Act of the Conference on Security and Cooperation in Europe (the "Helsinki Final Act"),[9] are frequently relied on by United States officials as a basis for criticizing other nations. For instance, in a recent speech to the United Nations General Assembly, President Reagan criticized the Soviet Union for seizing Nicholas Daniloff in violation of the protections afforded journalists by the Helsinki Final Act.[10] A year earlier, the State Department had complained to the Soviet Union that its jamming of broadcasts from the West violated the Helsinki Final Act.[11]

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7 Adopted and approved for signature, ratification and accession on Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966).

8 Adopted and opened for signature, May 22-23, 1969, by the U.N. Conference on the Law of Treaties; U.N. Doc. A/CONF. 39/27 (1969).

9 Final Act of the Conference on Security and Co-Operation in Europe, Aug. 1, 1975, 73 Dept. of State Bull. 323-350.

10 *See* The New York Times, Sept. 23, 1986, at 1, col. 6.

11 *Ibid.*

This document applies not only to the Soviets, but to our government and its interpretation of the Immigration and Nationality Act as well. The Helsinki Final Act provides that the "participating States [of which the United States is one] will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion."[12] It further calls upon all participating nations to "facilitate wider travel by their citizens for personal or professional reasons and to this end . . . to administer flexibly the procedures for exit and entry."[13] The participating States agreed to make it their aim "to facilitate the freer and wider dissemination of information of all kinds, and to encourage co-operation in the field of information and the exchange of information with other countries . . . ."[14] In furtherance of these goals, the participating States expressed their intention:

> [t]o facilitate the dissemination of oral information through the encouragement of lectures and lecture tours by personalities and specialists from the other participating States, as well as exchanges of opinions at round table meetings, seminars, symposia, summer schools, congresses and other bilateral and multilateral meetings.[15]

A major purpose of the McGovern Amendment was to fulfill these very requirements of the Helsinki Final Act. S. Rep. No. 194, 95th Cong., 1st Sess. 13 (1977), U.S. Code Cong. and Admin. News 1977, pp. 1625, 1635. In addition, Congress has made protection of free speech rights part of our international human rights policy. Since 1976, Congress has required the Department of State to report on the status of human rights in other countries. *See, e.g.*, International Security Assistance and Arms Control Export Act of 1976, Pub. L. No. 94-329, § 502B(b), 22 U.S.C. § 2304(b). Each year, the

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12 73 Dept. of State Bull. 325.

13 *Id.* 340

14 *Id.* 341

15 *Ibid.*

State Department complies by submitting to Congress a document entitled "Country Reports on Human Rights Practices" which prominently includes a section entitled "Respect for Civil Liberties: Freedom of Speech and Press."

These international instruments plainly require the United States, at a minimum, to make all reasonable efforts to permit aliens—even those with views disagreeable to the government—to enter this country and speak to American citizens who have invited them to engage in an exchange of views. Established principles of statutory construction require that the statute here in question be construed consistently with those instruments. Yet rather than ease its regulations regarding foreign travelers and open its public forums to different points of view, the government has read the McGovern Amendment narrowly and has prevented the aliens who are respondents' invitees from entering our land simply because it does not like what they may have to say. The Court should not infer a Congressional intention to flout international instruments to which the United States has subscribed.

CONCLUSION

For the reasons stated above, the two certified questions should be answered in the affirmative, the judgment of the court of appeals should be affirmed, and the appeal should be dismissed.

Respectfully submitted,

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RONALD W. REAGAN, *et al.*, *Petitioners*,

—v.—

JAMES ABOUREZK, *et al.*, *Respondents*.

GEORGE P. SHULTZ, *et al.*, *Petitioners*,

—v.—

CITY OF NEW YORK, *et al.*, *Respondents*.

GEORGE P. SHULTZ, *et al.*, *Petitioners*,

—v.—

BRUCE CRONIN, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* LAWYERS COMMITTEE FOR HUMAN RIGHTS, AMERICAS WATCH, THE AUTHORS LEAGUE OF AMERICA, INC., COMMITTEE TO PROTECT JOURNALISTS, FUND FOR FREE EXPRESSION, HELSINKI WATCH, THE NEWSPAPER GUILD, PEN AMERICAN CENTER, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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INTEREST OF AMICI

Lawyers Committee for Human Rights

The Lawyers Committee for Human Rights is a legal resource center in the areas of human rights and refugee law. Among the human rights it seeks to promote are the freedoms of persons to travel, speak and associate with others. The Lawyers Committee represents Choichiro Yatani, a Japanese scholar who was detained by immigration authorities for 44 days in July and August of 1986 on account of alleged involvement with a subversive organization, and Patricia Lara, a Colombian journalist who was excluded from the United States on ideological grounds without a hearing in October of 1986.

Americas Watch

Americas Watch is a U.S. citizens organization, founded in 1981, that monitors and promotes human rights in South America, Central America and the Caribbean. Among the questions of central concern to us are freedom of expression and freedom of movement. Americas Watch considers that its capacity to persuade other governments in the Western Hemisphere to respect freedom of expression and freedom of movement depends to a considerable extent on respect for those rights by the United States. If the United States itself does not respect those rights, a U.S.-based citizens group lacks credibility in attempting to persuade other governments to respect them.

Because many of those excluded from the United States on ideological grounds are prominent intellectuals and political leaders from Latin America, this is a matter of great concern in the region in which Americas Watch attempts to promote freedom of expression and freedom of movement.

Authors League of America, Inc.

The Authors League of America, Inc. is the national society of professional authors, representing more than 14,600 authors, dramatists, and journalists. The League counts among its membership both writers who live outside the United States and those who are citizens of other nations. The League links with writers' organizations in other countries, in pursuit of the interests common to all writers.

One of the League's principal purposes is to convey its members' views in cases involving fundamental questions of freedom of expression, and to support that fundamental Constitutional right. Barring the entry of a non-immigrant visa applicant on political grounds violates the most fundamental right to freedom of expression and has far-reaching implications for writers. In the past, the League has protested the attempted and actual ideological exclusions of such writers as Dennis Brutus, Dario Fo, Farley Mowat, and Angel Rama, and the League continues to protest the current deportation and exclusion of writers Margaret Randall and Patricia Lara.

Because determination of the issues presented on this appeal may affect seriously the First Amendment

rights of authors, dramatists, and journalists to receive information and to create their literary, dramatic, and reportorial works in an uninhibited marketplace of ideas, the League joins in the filing of this brief.

Committee to Protect Journalists

The Committee to Protect Journalists was founded in 1981 by several U.S. journalists who sought to use the very substantial influence of the U.S. press to mobilize support for journalists and news organizations around the world that were under attack. It does casework (uncovering, investigating, protesting and publicizing approximately 300 cases in 1986), provides an information service for the press, publishes a newsletter and sends delegations to countries where the press is in jeopardy.

Moreover, it launches campaigns that include 25 human rights and press groups around the world.

CPJ is not merely a fraternal organization for journalists; rather, it seeks to create a climate in which the press worldwide can gather and present news that enhances public awareness and keeps governments accountable.

It is concerned about the ongoing pattern of exclusion by the U.S. government of various individuals among whom are journalists. We find the practice distinctly contrary to the right to freedom of expression, and therefore dangerous to the concepts on which this country was founded.

Fund for Free Expression

The Fund for Free Expression was founded in 1975 by a group of authors, publishers, journalists and other interested individuals to champion the right of their counterparts the world over to express themselves freely without fear of retribution -- a right proclaimed in the Universal Declaration of Human Rights. Since its formation, the Fund for Free Expression has also been concerned with the right of individuals to travel -- the right of Americans to travel abroad and the right of foreign nationals to visit the United States, rights also proclaimed in the Universal Declaration of Human Rights and guaranteed in the Helsinki Accords and other international agreements.

In 1980, the Fund for Free Expression became the coordinating

agency for a brief presented to the then-sitting Select Commission on Immigration and Refugee Policy. The brief, entitled "The Case for Repeal," urged repeal of the McCarran-Walter Act, which has been used to deny visas to foreign nationals because of their ideological beliefs. In 1984, the Fund became a sponsoring agency of a newly formed coalition, Free Trade in Ideas, a coalition of over fifty national professional organizations. The Free Trade in Ideas project is dedicated to the repeal of McCarran-Walter and underscores the fact that denial of visas to foreign nationals to visit the United States because of their political beliefs further deprives Americans of their First Amendment right -- the right to hear expressions of all points of view.

Helsinki Watch

The U.S. Helsinki Watch Committee is a citizens' organization created in 1979 that promotes compliance in the thirty-five signatory nations with the human rights provisions of the 1975 Helsinki Accords, including the provisions that are intended to facilitate the free flow of people, information and ideas across national boundaries. Helsinki Watch joins this brief in order to promote the human rights standards embodied in the Helsinki Accords.

Newspaper Guild

The Newspaper Guild is a trade union representing 40,000 employees of newspapers, magazines, wire services and related enterprises in the United States, Canada and Puerto Rico. It has

been actively involved in protecting the First Amendment rights of its members and all Americans. It has protested the exclusion and/or detention of foreign news correspondents on ideological grounds without hearings, including the recent exclusion of Patricia Lara, a Colombian journalist, and the detentions of Olga Behar, another Colombian journalist, and Tom Ronse, a Belgian journalist.

PEN

PEN American Center is a non-partisan, non-profit organization with a membership of over 2,000 writers. It is affiliated with International PEN: a world-wide association of writers -- poets, playwrights, essayists, editors, novelists -- with centers in Europe,

Asia, Africa, Australia and the Americas.

PEN believes in freedom of speech and freedom of the press and that literature, national though it be in origin, knows no frontiers, and should remain common currency between nations. But these basic freedoms have been abridged under the 1952 McCarran-Walter Act, which makes exclusion from this nation possible on grounds of ideological differences.

For example, Nobel Laureate Gabriel Garcia Marquez was first denied a visa to the United States in 1963; he finally received a provisional one in 1971. Internationally known writer Carlos Fuentes has been denied visas on several occasions, subjected to bureaucratic delays, and travel restrictions. Over a period of four

years, distinguished Italian dramatist Dario Fo was denied visas; in 1984, he was not admitted in time to participate in the rehearsal of his play, Accidental Death of an Anarchist, in New York. Popular Canadian nature writer Farley Mowat was refused admission to the United States in 1985 on unspecified "ideological" grounds. For the past two years, former American citizen Margaret Randall has been fighting deportation proceedings because I.N.S. Judge Martin Spiegel found her writing objectionable.

Reporters Committee for Freedom of the Press

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to

protecting the First Amendment interests of the news media and the public. Since its founding in 1970, the Reporters Committee has participated as amicus curiae in virtually every major First Amendment media law case before the U.S. Supreme Court, and in many media law cases in other federal and state courts.

The Reporters Committee has long been concerned that the exclusion of foreign journalists, writers, and scholars from the United States on ideological grounds will unconstitutionally restrict the free flow of information to the American people. In October 1986, the Reporters Committee protested the detention and expulsion of journalist Patricia Lara in letters to INS Commissioner Alan C.

Nelson, Attorney General Edwin Meese III, and Secretary of State George P. Schultz.[1]

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1. Counsel for petitioners and respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The visa denials in this case are based on ideological discrimination against speakers and listeners because of the content of the proffered speech. This governmental action impermissibly infringes the basic rights of Americans to free speech and association under the First Amendment. The exclusion statutes involved in this case should be interpreted narrowly to square with these constitutional entitlements, and the visa denials overruled.

Moreover, these visa denials are contrary to the Helsinki Accords, the international law antecedent to the McGovern Amendment. The promotion of the free flow of persons and ideas across borders, a basic aim of the Helsinki Accords, is a principle which

should be used to interpret narrowly the statutory basis for these exclusions, and to overturn them.

ARGUMENT

Point I

THESE VISA DENIALS, WHICH ARE BASED ON IDEOLOGICAL GROUNDS, VIOLATE THE FIRST AMENDMENT

The constitutional interests in this case are well-established and as weighty as they can be. The First Amendment proscribes the enactment of legislation "abridging the freedom of speech." U.S. Const. amend. 1. This basic limitation on governmental power guarantees the right of Americans to speak and associate with others. The right to associate is inherent in the right of free speech. As the Supreme Court has explained "[w]hile the freedom of association is not explicitly set out in the Amendment, it has long been held

to be implicit in the freedoms of speech, assembly, and petition." Healy v. James, 408 U.S. 169, 181 (1972). The right of free association is general in its application, and "the Court has consistently disapproved governmental action ... denying rights and privileges solely because of a citizen's association with an unpopular organization." Id. at 185-86.

The First Amendment is a crucial aspect of democratic society. Free speech and association were conceived "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail...." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). They necessarily extend to "ideas hateful to the prevailing climate of opinion...." Roth v. U.S., 354 U.S. 476, 484 (1956).

Free association is a prerequisite to the full and complete exercise of the right of free speech and expression. One has the right to hear unpopular views from those who proffer them, as it is not:

> enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. This is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from those who actually believe them; who defend them in earnest, and do their very utmost for them.

Red Lion, 395 U.S. at 392 n.18, quoting J.S. Mill, On Liberty 32 (R. McCollum ed. 1947). See also Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (government's contention that modern methods of communication may suffice "... overlooks what may be particular qualities inherent in sustained,

face-to-face debate, discussion and questioning").

The First Amendment "necessarily protects the right to receive..." information. Martin v. City of Struthers, 319 U.S. 141, 143 (1943), quoted in Lamont v. Postmaster General, 381 U.S. 301, 308 (Brennan, J. concurring) (1961). This extends to "[a]ll ideas having even the slightest redeeming social importance...." Roth, 354 U.S. at 484.

The right to receive information, including information from abroad and contact with visitors from other countries, is thus constitutionally protected. As Mr. Justice Brennan explained in finding unconstitutional a statute requiring allegedly "Communist political propaganda" sent through the mail to be intercepted and held by the

authorities: "the protection of the Bill of Rights goes beyond the specific guarantees to protect from Congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful." Lamont, 381 U.S. at 308. See also Stanley v. Georgia, 394 U.S. 557, 564 (1969) (the First Amendment rights to free speech and press necessarily includes the right to "receive information and ideas."); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (statute requiring citizens to relinquish membership in proscribed organizations in order to exercise their right to travel violative of First Amendment).

The Constitution prohibits even restrictions on nonverbal elements involved in the exercise of free speech except where a "sufficiently important

governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." U.S. v. O'Brien, 391 U.S. 367, 376-377 (1968). See also Tinker v. Des Moines School District, 393 U.S. 503 (1969) (wearing of armband in peaceful protest held to be action closely akin to "pure speech" and entitled to protection under the First Amendment).

Efforts to abridge basic First Amendment rights are to be strictly scrutinized and only compelling governmental interests can overcome these entitlements. See O'Brien, 391 U.S. at 377. Such restrictions are permitted only when (1) the restriction is within the constitutionally granted power of government, (2) there is an important or substantial government

interest unrelated to the suppression of free expression, and (3) the incidental restriction is not greater than necessary to accommodate the governmental interest. Id. at 377.

The Supreme Court has held that government may not restrict First Amendment freedoms under the Constitution "simply because it finds the views expressed by any group to be abhorrent." Healy, 408 U.S. at 187. The Court has even found a distinction between "the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force or violence" and "preparing a group for violent action and steeling it to such action." Brandenberg v. Ohio, 395 U.S. 444, 448 (1969), quoting Noto v. United States, 367 U.S. 290, 297-98 (1961). Under the First Amendment,

"undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Police Department v. Mosley, 408 U.S. 92,101 (1972), quoting Tinker, 393 U.S. at 508.

The Court in Brandenberg enunciated the test for restrictions on First Amendment freedoms involving the advocacy of resort to force:

> the Constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to initiating or producing imminent lawless action and is likely to incite or produce such action.

Brandenberg, 395 U.S. at 447.

In the immigration context, the Court has yet to reconcile the clear First Amendment rights of American citizens with the traditional

power of the sovereign to bar aliens from entering its territory. The cases acknowledging the government's plenary power to exclude aliens are not relevant herein, for the rights of Americans were not at stake. See Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889). In Kleindienst v. Mandel, the question was only whether the Attorney General had a "facially legitimate and bona fide reason" to deny a waiver of admissibility to the alien, a Belgian Marxist who had been invited to several speaking engagements by American citizens.[2] Mandel, 408

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2. In those instances where the lower courts have applied the "facially legitimate and bona fide reason" standard to exclusionary activity, the judges have considered

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> themselves obliged to permit disclosure of the asserted "reasons" for exclusion. As the Court of Appeals explained:
>
> "the State Department may exclude someone simply by pointing to her membership in a subsection (28) organization; the additional, conclusory assertion that the organization has certain affiliations provides no safeguard because the assertion may be offered in every case and cannot be questioned or reviewed by any court .... A statement thus walled off from any effective challenge scarcely qualifies as a reason."

Abourezk v. Reagan, 785 F.2d 1043, 1058 n.20 (D.C. Cir. 1986). See also Harvard Law School Forum v. Shultz, 633 F. Supp. 525 (D. Mass. 1986); Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985); El-Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982). But a facially-plausible "reason" is plainly insufficient to justify a visa denial given the weighty constitutional interests involved in ideological exclusions.

U.S. at 769. The Court upheld the waiver denial because of Mandel's violation of the conditions of a prior temporary visa. Id. at 769. The First Amendment question was one the Court determined to "neither address nor decide in this case." Id. at 770.

The application of 8 U.S.C. §1182(a)(27) in this case is unconstitutional.[3] The exclusions were based on the anticipated content

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3. Many additional aliens have been denied visas under 8 U.S.C. § 1182(a)(28), including Latin American authors Gabriel Garcia Marquez and Carlos Fuentes, African playwrights Dennis Brutus and Cosmo Pietersce, the Uruguayan literary essayist and literature professor Angel Rama, and Italian playwright Dario Fo. See Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York, Visa Denials on Ideological Grounds: An Update, 8 Seton Hall Leg. J. 249, 252-59 (1984-85).

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of the speech to be proferred by the foreign visitors and there was no compelling governmental interest advanced to justify the abridgment of the First Amendment rights of American citizens. The only reasons other than membership in a subsection (28) organization offered by the government as grounds for exclusion were conclusory invocations of vague foreign

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Most recently, the deportation proceedings brought against writer Margaret Randall, as well as the incarceration for 44 days in August 1986 of a Japanese scholar, Choichiro Yatani, and the exclusion without a hearing in October 1986 of Patricia Lara, a Colombian journalist who was invited to attend an awards ceremony at the Columbia School of Journalism, has raised questions about the propriety and fairness of ideological exclusions. See NY Times, Nov. 13, 1986 at A 30, col. 1; Shapiro, Ideological Exclusions: Closing the Border to Political Dissidents, 100 Harv. L. Rev. 930, 933 n.23, 940 (1987).

policy concerns of the United States. Tomas Borge was excluded because his admission would be "'highly prejudicial to the foreign policy interests of the United States,'" Gov't Br. 8; Olga Finlay and Leonora Rodriguez Lezcano were excluded because their admission "would prejudice the foreign affairs of the United States," Gov't Br. 9; and Nino Pasti was excluded because his admission "would prejudice the conduct of United States foreign policy," Gov't Br. 10. But the existence of a nonverbal aspect of communication in the exercise of such speech, here "mere presence or entry," can not extinguish the constitutional considerations. Indeed, in this case, the "presence" and "entry" of the foreign visitors are indistinguishable from the rights to hear and associate with them.

Nor do conclusory assertions by the government of "foreign policy concerns" diminish the gravity of the abridgement of the First Amendment in this case. Similar governmental assertions have been found wanting when measured against the constitutional right to travel. See, e.g., Aptheker v. Secretary of State, 378 U.S. at 500; Kent v. Dulles, 357 U.S. 116, 125-27, 129-30 (1958).

The travel restrictions at issue in Aptheker and Kent, imposed for purported foreign policy reasons, were nonetheless scrutinized carefully because of the important constitutional interests involved. The Court has enunciated a "serious damage" test before foreign policy reasons can justify restrictions on the travel rights of American citizens. See Haig v. Agee, 453 U.S. 280, 306 (1981)

("serious damage" standard met and revocation of passport allowed when holder of passport planned to expose abroad American intelligence activities of which he had special knowledge).

The application of the ideological exclusion provisions in ways that are calculated to discriminate among speakers and listeners for political reasons infringes the basic protections of the First Amendment. Government action which is not content-neutral with respect to speech is unconstitutional. Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984). The Court has recognized that:

> [t]he essence of . . . forbidden censorship is content control. Any restrictions on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide

> open." . . . There is an "equality of status in the field of ideas" and government must afford all points of view an equal opportunity to be heard . . . . Selective exclusions from a public forum may not be justified by reference to content alone.

Mosley, 408 U.S. at 96, quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964), and A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948). See also Carey v. Brown, 477 U.S. 455 (1980).

The Court must scrutinize whether the ideological exclusion provisions of the immigration statute are being applied in a neutral fashion in this case.[4] To justify exclusion, the governmental interests must be compelling and content-neutral.

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4. The statutory framework for the exclusions in this case are

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composed of a number of interrelated provisions. The provision pursuant to which the government excluded the four aliens in this case, 8 U.S.C. § 1182(a)(27), directs the exclusion of an alien if the Attorney General has reason to believe that the alien seeks "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." Furthermore, if the alien is found to be within the subsection (27) classification, exclusion is mandatory. Subsection (28) authorizes the exclusion, inter alia, of aliens who are, or at any time have been "members of ... the Communist Party of the United States ... the Communist ... party of any foreign state, or ... any ... affiliate ... of any such ... party." 8 U.S.C. § 1182(a)(28)(C) (1982). Unlike subsection (27), subsection (28) does not require the Secretary of State to exclude any alien who meets the stated criteria. If the Secretary recommends a waiver of ineligibility, then, in the discretion of the Attorney General,

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Any resulting restriction on First Amendment freedoms must not serve to stifle unnecessarily these basic individual liberties. See O'Brien, 391 U.S. at 377; Shelton v. Tucker, 364 U.S. 479, 488 (1960).

In this case, as has been shown, the visa denials were predicated

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> the alien may be admitted. 8 U.S.C. § 1182(a)(3)(A) (1982). The McGovern Amendment, 22 U.S.C. § 2691, provides that "the Secretary of State should, within 30 days of receiving an application for a non-immigrant visa by any alien who is excludable [under subsection (28)] ... but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa ... unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate."

on the anticipated content of respondents' speech. As such, they violate the near-absolute proscription on abridgments of First Amendment rights.

Furthermore, the Court of Appeals was correct in holding that the language in subsection (27) is not susceptible to a reading that would permit exclusion solely for the "entry or presence" of the alien, and that subsection (27) must be read narrowly in conjunction with subsection (28) so that the presumptive waiver of admissibility under the McGovern Amendment is not nullified. Abourezk v. Reagan, 785 F.2d at 1053-57. This construction is mandated not only by accepted principles of statutory interpretation and construction, but also by the implacable force of the First Amendment.

Point II

THESE VISA DENIALS ARE ALSO INCOMPATIBLE WITH THE HELSINKI ACCORDS, THE INSPIRATION FOR THE McGOVERN AMENDMENT

The United States is one of the thirty-five signatory states to the Final Act of the Conference on Security and Co-Operation in Europe ("CSCE") which was signed in Helsinki on August 1, 1975.[5] The CSCE, which opened at Helsinki on July 3, 1973, was intended to broaden the process of detente and contribute to peace, justice and security in Europe by improving relations among the participating states.

The Final Act contains three main sections, (i) security in Europe,

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5. Department of State Bulletin of September 1, 1975, reprinted in 14 Int'l L. Mat. 1292 (1975).

(ii) cooperation in the fields of economics, science and technology, and the environment, and (iii) cooperation in humanitarian and other fields. The Western nations, including the United States, have always attached great importance to this third section, which is aimed at improving the free movement of people, ideas and information. Participation of these states in the CSCE was on condition that its scope be extended beyond questions of security, because they regarded the "rigid control of individual contacts and the dissemination of information as detrimental to European security interests." 122 Cong. Rec. 15,050 (1976).

The purpose of the third section regarding cooperation is to

facilitate "free movement and contacts, individually and collectively, whether privately or officially, among persons, visitations and organizations of the participating states, and to contribute to the solution of the humanitarian problems that arise in that connection." Specifically, according to the terms of the Final Act, the United States, as a participating state, has undertaken "gradually to simplify and to administer flexibly the procedures for exit and entry" and "to ease regulations concerning movement of citizens from the other participating states in [its] territory ...." 14 Int'l L. Mat. at 1314. In addition, there are provisions to improve the circulation of and access to information by, inter alia, encouraging lecture tours and other bilateral and

multilateral meetings with personalities and specialists from other participating states and to improve educational and scientific exchanges for students, teachers and scholars, including the facilitation of travel between the participating states.

The denial of visas to persons intending to travel to the United States for the purpose of speaking at universities and to other interested groups and otherwise participating in an exchange of information and ideas is, therefore, clearly contrary to the letter and the spirit of the Final Act. The whole thrust of the third section of the Act, to which the United States has always attached great importance, is to enable a cross exchange of ideas and information between different countries and to

permit citizens to hear the views of those having different beliefs and cultural backgrounds from their own. See Implementation of the Helsinki Accords: Hearings before the Commission on Security and Cooperation in Europe, 96th Cong., 1st Sess. 1 (1979). To deny visas to individuals on the very basis of such beliefs is to deny the principles that lie at the heart of the Helsinki Final Act -- principles which the United States and other Western nations fought to uphold and have reflected in the text of the agreement.

The Final Act was codified in principle by Congress in the McGovern Amendment. The intent of Congress was to conform United States immigration law to the goal of free exchange of ideas across borders articulated in the

Helsinki Accords. See 22 U.S.C. § 1291(a)(1982); S. Rep. No. 194, 95th Cong., 1st Sess. 13 (1977) (The purpose of the McGovern Amendment was to "facilitate 'statutory United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe' . . . which call for a reduction in barriers to the free movement of people and ideas."); Abourezk, 785 F.2d at 1057-58, 1058 n. 17.

While the Final Act is not a document which is, in itself, binding in the sense of a treaty, it was and is considered by the signatories to be morally binding as a statement of mutual intent concluded at the highest levels. In addition, provisions closely follow many of the accepted norms of international law which have

developed by custom and practice into rules of binding customary international law.[6]

Furthermore, the United States not only has clearly indicated its own commitment to the provisions of the Final Act, but also has repeatedly criticized other participating states,

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6. Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression which includes the right "to seek, receive and impart information and ideas through any media and regardless of frontiers" [emphasis added]. U.N. Doc. A/801 (1948). See Restatement of the Foreign Relations Law of the United States, § 702 (Tent. Draft No. 2, 1982). Comment b to Section 702 makes it clear that where human rights norms have evolved by reason of state practice, including as embodied in the international instruments, such customary legal principles are "part of the law of the United States to be applied as such by State as well as federal courts."

in particular many of the Eastern European countries, for their failure to implement these provisions and to abide by the terms of the Act.

President Gerald Ford, on the occasion of the signing of the Final Act, said in his speech,

> we take this work and these words [of the Final Act] very seriously. We will spare no effort to ease tensions and solve problems between us. But it is important that you recognize the deep devotion of the American people and their Government to human rights and fundamental freedoms and thus to the pledges that this Conference has made regarding the freer movement of people, ideas and information.

121 Cong. Rec. 28,036 (1975). Echoing these sentiments, President Carter, in his speech to the United Nations in March of 1977, emphasized the importance of a more universal respect for fundamental human rights and added, "[t]o demonstrate that commitment, we

are moving now to liberalize almost completely travel opportunities to America."[7] The denial of visas on ideological grounds is in clear contradiction to these statements.

In order to monitor the implementation of the Helsinki Accords, a Congressional Commission on Security and Cooperation in Europe was created in 1976. This body has examined the issue of visa denials in the United States, and has pointed out that it is hypocritical for the United States to criticize other states for their failure to implement the Accords when it is itself guilty of this failure to

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7. Implementation of the Helsinki Accords: Hearings before the Commission on Security and Cooperation in Europe, supra p. 40, at 1.

honor the terms of what it upholds as an international obligation.[8]

Thus, the United States, by signing the Helsinki Final Act and by encouraging other defaulting signatory states to observe their commitments, clearly espouses foreign policy aims inconsistent with the use of subsection (27) to exclude foreign academics, artists and intellectuals. See Carliner, United States Compliance with the Helsinki Final Act: The Treatment of Aliens, 13 Vand. J. Transnat'l L. 397 (1980). The use of this provision ultimately frustrates the aims of peace and security which the CSCE was designed to facilitate.

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8. See authority cited in note 7, passim.

The need to interpret the McGovern Amendment[9] to be consistent with the Final Act comports with the settled principle of statutory interpretation that domestic statutes be interpreted, wherever possible, consistently with international law. See Restatement of Foreign Relations Law of the United States, § 134 (Tent. Draft No. 6, 1985). The Final Act, while not strictly a statement of binding international law, represents an international commitment of the United States and, as such, should be interpreted to be consistent with the Final Act.

This Court should therefore interpret subsections (27) and (28), together with the McGovern Amendment,

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9. See note 4, supra.

in light of the letter and the spirit of the Final Act. This goal can be achieved by interpreting the McGovern Amendment to require a showing, supported by concrete evidence, that an alien is excludable under subsection (27) for reasons distinct from his membership in a subsection (28) organization. Such an interpretation would require that the visa denials in this case be overruled.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

New York, New York
April 3, 1987

Respectfully submitted,[10]

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10. Counsel wishes to acknowledge the assistance of Maurice Nyberg, law student, in the preparation of this brief.

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No. 86-656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, *et al.*,
Petitioners,
v.
JAMES ABOUREZK, *et al.*,
Respondents,

GEORGE P. SHULTZ, *et al.*,
Petitioners,
v.
CITY OF NEW YORK, *et al.*,
Respondents,

GEORGE P. SHULTZ, *et al.*,
Petitioners,
—v.
BRUCE CRONIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-656

RONALD W. REAGAN, *et al.*,
Petitioners,
v.
JAMES ABOUREZK, *et al.*,
Respondents,

GEORGE P. SHULTZ, *et al.*,
Petitioners,
v.
CITY OF NEW YORK, *et al.*,
Respondents,

GEORGE P. SHULTZ, *et al.*,
Petitioners,
v.
BRUCE CRONIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE [1]

The American Bar Association ("ABA") is the leading national member organization of the legal profession,

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[1] The parties' letters of consent have been lodged with the Clerk pursuant to Supreme Court Rule 36.2.

counting as members more than 320,000 lawyers throughout the United States. In 1986, the ABA adopted a resolution calling for an end to this country's exclusion of aliens solely on the basis of political beliefs or political associations. ABA, *Summary of Action of the House of Delegates* 16 (Midyear Meeting, February 10-11, 1986).[2] Previously, the ABA had expressed its strong support for implementation of the Helsinki Accords, an international understanding that calls for a freer exchange of people

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[2] The ABA has resolved:

> That the American Bar Association recommends that United States law concerning visa denials should conform to the following standard:
>
> > An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current beliefs or political associations or on the basis of the expected content of the person's statements in the United States.
> >
> > However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or activity in which the government believes they intend to engage, would harm the interests of the United States, including the foreign relations of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country, nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation, nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.
> >
> > Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28).

ABA, *Summary of Action of the House of Delegates* 16 (Midyear Meeting, February 10-11, 1986). Implementation of the principles expressed in the ABA's resolution would require modification of 8 U.S.C. § 1182(a)(28) because the McGovern Amendment, 22 U.S.C. § 2691, while consistent with the ABA resolution, only limits exclusions based solely on *membership* in a political organization and does not address exclusions based solely on political *beliefs*.

and ideas throughout the world. *See* ABA, *Summary of Action of the House of Delegates* 18 (Midyear Meeting, February 13-15, 1978); ABA, *Summary of Action of the House of Delegates* 13 (Annual Meeting, August 8-10, 1977). The cases now before the Court directly implicate the concerns reflected in these resolutions.

Moreover, exclusion of three of the aliens in these cases prevented them from exchanging their views with bar association groups, law schools, and lawyers in this country. ABA members have a direct interest in hearing foreign speakers discourse on legal topics in this country. Exclusion of such speakers will impede legal education and debate, which are of considerable importance to the legal profession and to the nation. The ABA's commitment to the free exchange of people and ideas and its opposition to exclusions based on political beliefs and associations, therefore, underlie its strong interest in these cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ABA submits this brief in support of the proposition that the executive branch may not exclude an alien pursuant to 8 U.S.C. § 1182(a)(27) solely on the basis of inferences drawn from the alien's membership in a communist party or affiliated organization. The exclusion of aliens from the United States based solely on their political beliefs or associations violates our nation's commitment to freedom of speech, freedom of association, and the free exchange of ideas both within the United States and across national borders. These fundamental principles, embodied in the first amendment to the United States Constitution and reaffirmed by our government in signing the Helsinki Accords, recognize that the free exchange of information and ideas is vital to the health of a democratic society. By contrast, exclusions based solely on ideological grounds reflect a mistrust of the democratic process, impairing American citizens' ability to

make fully informed decisions by censoring the ideas and information they receive from abroad. Recognizing that such exclusions are inconsistent with the first amendment values expressed in the Helsinki Accords, Congress enacted the McGovern Amendment to restrain the executive branch from excluding aliens on the basis of their political associations.

In the cases now before this Court, the executive branch has excluded aliens invited by Americans to share their views. In at least one of these cases, it has done so on the basis of a presumption that mere membership in certain organizations believed to be supported by ruling communist parties or governments is proof of an alien's representation of a foreign government. If countenanced, this presumption would enable the executive branch to exclude aliens, as it had prior to the McGovern Amendment, solely on the basis of their political associations. Such exclusions would circumvent congressional limits upon the Executive's delegated authority to exclude aliens.

The McGovern Amendment retains its vitality only if the executive branch is required to make an individualized determination regarding each alien, proffering bona fide reasons for exclusion that are genuinely independent of the alien's membership in a disfavored political organization. Accordingly, to preserve the free exchange of ideas that the first amendment, the Helsinki Accords, and the McGovern Amendment seek to ensure, the statutory provisions at issue in these cases must be construed to prohibit a presumption of excludibility from the mere fact of an alien's membership in a communist party or affiliated organization.

ARGUMENT

The Exclusion of Aliens Based Upon Inferences Drawn from Their Membership in Certain Political Organizations Impermissibly Circumvents the McGovern Amendment.

A. Exclusions Based Solely on Ideological Grounds Are Inconsistent with the Free Exchange of Ideas.

The exclusion of aliens based solely on their political beliefs or associations is fundamentally at odds with our democratic society because it deprives American citizens of opportunities to exchange ideas with foreign speakers. The nation's commitment to freedom of speech and freedom of association, both within the United States and across national boundaries, reflects an understanding that the free exchange of ideas is essential to a political system of self-government:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. * * * They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a public duty; and that this should be a fundamental principle of the American government. * * * Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.

Whitney v. *California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). Exclusions based on political associations, however, impede American citizens in their efforts to gather information and insights from abroad about matters of public concern. When government ob-

structs the free exchange of ideas, it prevents American citizens from hearing, discussing, and evaluating all sides of an issue and, as a result, our system of self-government is impaired. *See Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas").

These principles are embodied in the first amendment to the United States Constitution, which is directly implicated when ideological exclusions deprive Americans of the right to receive information and ideas. *See Kleindienst* v. *Mandel*, 408 U.S. 753, 762-65 (1972) (discussed below at p. 16). As this Court has explained in another context:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail * * *. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 390 (1969). Through open and robust debate in this "uninhibited marketplace of ideas," American citizens inform themselves concerning policy choices that shape their lives. The exchange of ideas with people from other countries is a vital component of that marketplace. Indeed, the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.)).

Exclusions based solely on political associations also contravene the spirit of the Final Act of the Conference on Security and Cooperation in Europe, signed at Helsinki in 1975 (the "Helsinki Accords"). In signing the Helsinki Accords, the United States, along with other

participants, pledged to facilitate free movement and contact among persons and organizations of the participating nations. The Helsinki Accords set forth a declaration of the participating states which provides a framework for international relations between East and West.[3] The Accords express a strong commitment to the free flow of people and ideas across national borders:

> The participating states * * * make it their aim to facilitate free movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating states * * * [and] to facilitate the freer and wider dissemination of information of all kinds, to encourage cooperation in the field of information and the exchange of information with other countries.

Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1975. The Helsinki Accords reflect the same understanding of the value of freedom of association and the free exchange of ideas as the first amendment.

In 1977, in order to implement these values and achieve greater compliance by the United States with the Helsinki Accords, Congress enacted the McGovern Amendment, 22 U.S.C. § 2691 (1982). The McGovern Amendment seeks to resolve the discrepancy between the first amendment values reflected in the Helsinki Accords and subsection 28 of section 212 of the Immigration and Nationality Act of 1952 (the "McCarran-Walter Act"), 8 U.S.C. § 1182(a)(28) (1982). The latter provision sanctioned the exclusion of aliens based solely on their political associations. Following the Helsinki Conference, Congress recognized that exclusions of this sort are funda-

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[3] Thirty-five nations participated in the conference, including the vast majority of eastern and western European states, the Soviet Union, Canada, and the United States. *See* Robertson, *The Helsinki Agreement and Human Rights*, 53 Notre Dame Lawyer 34 (1977).

mentally at odds with the American commitment to an open marketplace of ideas. Consequently, the McGovern Amendment seeks a "reduction in the barriers to the free movement of people and ideas" by limiting the instances in which the executive branch will exclude an alien solely on the basis of political association.[4] S. Rep. No. 194, 95th Cong., 1st Sess. 13, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1625, 1635.

In the cases before the Court, the executive branch's interpretation of its delegated authority to exclude aliens is inconsistent with the McGovern Amendment. Respondents in one of the cases, for example, include groups of United States citizens concerned about this country's nuclear arms policy. In 1983, they invited Nino Pasti, a former Italian Air Force general, Italian Senate member, and representative to NATO, to speak with them about the United States' planned deployment of nuclear missiles in Europe. Pasti also is a peace activist and a member of the World Peace Council. The executive

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[4] The McGovern Amendment provides, in relevant part:

> For purposes of achieving greater United States compliance with the [Helsinki Accords] and for purposes of encouraging other signatory countries to comply with those provisions, the Secretary of State should, within thirty days of receiving an application for a nonimmigrant visa by an alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such alien, unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate. Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization.

22 U.S.C. § 2691(a).

branch excluded him, claiming that he was an agent of the Soviet Union, but the only fact about Pasti offered as a basis for that conclusion was his membership in the Council, an organization which the State Department considers to be a communist group supported by the Soviet Union. Pet. App. at 92a. The exclusion has deprived respondents of Pasti's insights and an opportunity to inform themselves further about their government's policies. Exclusions of this sort erect barriers to the free exchange of ideas, thereby undermining first amendment values and eviscerating the McGovern Amendment.

B. The McGovern Amendment Promotes Freedom of Association and the Free Exchange of Ideas Across National Borders.

The McGovern Amendment reconciles the McCarran-Walter Act with the principle that aliens should not be excluded solely because of their political associations. The structure and legislative histories of the McCarran-Walter Act and the McGovern Amendment demonstrate that Congress acted in the latter statute to halt the exclusion of aliens on the basis of their political associations.

Of the thirty-three exclusion provisions contained in the McCarran-Walter Act, subsection (a)(28) of section 212 ("subsection 28") is the only one that bars aliens from the United States on the basis of their political associations. When Congress enacted the McCarran-Walter Act in 1952, "membership in, or affiliation with certain subversive organizations * * * [and] advocacy of certain subversive doctrines * * *" was considered one of "[t]he more important grounds for classifying an alien within the excludable classes * * *." H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 45, *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653, 1698. Communists and "any other totalitarian party," 8 U.S.C. § 1182(a)(28)(C)(ii), are the only political groups targeted for exclusion. Thus,

subsection 28 was intended to single out for exclusion aliens adhering to the beliefs, or associating with those who adhered to the beliefs, of "the Communist Party, the Communist Political Association, and other totalitarian parties or any other organization that advocates certain subversive doctrines." H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 49, *reprinted in* 1952 U.S. Code Cong. & Admin. News at 1703. *See also* S. Rep. No. 194, 95th Cong., 1st Sess. 13, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1625, 1635; *accord* S. Rep. No. 842, 95th Cong., 2d Sess. 16 (1978) ("the principal purpose, and effect, of [subsection 28] was to exclude Communists from the United States").

The McGovern Amendment expressly modifies this restriction on admission. Prior to enactment of the McGovern Amendment, exclusion on subsection 28 grounds could be waived, but Congress committed the waiver decision to the executive branch with no explicit guidance as to how that discretion was to be exercised. *See* 8 U.S.C. § 1182(d)(3) (1982). Through the McGovern Amendment, Congress made it clear that exclusions based on political associations should routinely be waived. Specifically, the McGovern Amendment calls upon the Secretary of State to recommend to the Attorney General that a waiver be granted whenever an alien is excludible only by reason of membership in an organization encompassed by subsection 28, unless the Secretary determines and certifies to Congress that admission of that alien would threaten the security interests of the United States. Thus, the McGovern Amendment restricts the scope of subsection 28 by declaring that aliens should not be excluded on the sole basis of their political affiliation unless national security would otherwise be threatened.

The terms and legislative history of the McGovern Amendment demonstrate that it was intended to limit the executive's discretion to exclude aliens on the basis of their political associations. The Amendment itself

states that it was enacted "[f]or purposes of achieving greater United States compliance with the provisions of the [Helsinki Accords]." 22 U.S.C. § 2691(a). *See* H.R. Conf. Rep. No. 537, 95th Cong., 1st Sess. 31-32, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1658, 1662 (the McGovern Amendment "reflects the serious intent of the Congress in moving the United States towards greater compliance with the Helsinki final act * * *"). As Congress viewed it, "[t]his would * * * serve to facilitate * * * a reduction in barriers to the free movement of people and ideas." S. Rep. No. 194, 95th Cong., 1st Sess. 13, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 1635.[5]

The McGovern Amendment thus injects the spirit of the Helsinki Accords into this country's visa policy toward aliens who are members of organizations representing political beliefs ideologically opposed by the United States government. The McGovern Amendment's restriction on exclusions pursuant to subsection 28—the only provision in section 212 that singles out aliens on ideological grounds—indicates Congress' concern that all aliens, communist or otherwise, be admitted or excluded without regard to their political associations. Moreover, the overarching goal of the McGovern Amendment—to implement the Helsinki Accords' promotion of the free exchange of ideas and people across national borders—further evidences Congress' desire to neutralize those exclusion provisions of the McCarran-Walter Act which regulate access to audiences in the United States on the basis of political associations.

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[5] The dissent in the court of appeals erroneously concludes that the majority's analysis "confer[s] upon communists a favored entry status." 785 F.2d at 1072. Rather than conferring a favored status on certain political organizations, the McGovern Amendment removes a disability selectively attached to those groups. Consistent with the Helsinki Accords, the Amendment restrains the executive branch from excluding aliens on the basis of membership in *any* political organization.

C. The Executive Branch's Presumption of Excludibility from an Alien's Political Associations Contravenes Congress' Intent.

As the McGovern Amendment dictates, an alien's membership in a particular political organization is no basis for exclusion absent extraordinary circumstances.[6] In these cases, however, the executive branch may have presumed, solely on the basis of an alien's membership in a communist organization, that he is an agent of a hostile foreign government and therefore excludible under 8 U.S.C. § 1182(a)(27) (1982) ("subsection 27").[7] Although the McGovern Amendment does not preclude the executive branch from excluding aliens "for *reasons other than* membership in or affiliation with a proscribed organization," 22 U.S.C. § 2691(a) (emphasis added), such reasons must be genuinely independent of membership in a subsection 28 organization.[8] The court below correctly concluded that the executive branch may not apply subsection 27 to circumvent the requirements of the McGovern Amendment:

> [W]hen an alien is a member of a proscribed organization, so that subsection (28) applies, the gov-

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[6] In "the unlikely event that the prospective visitor would constitute a threat to U.S. security," S. Rep. No. 194, 95th Cong., 1st Sess. 13, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1625, 1635, the McGovern Amendment directs the Secretary of State to certify to both houses of Congress that the alien poses a threat to national security. *See* 22 U.S.C. § 2691(a). In these cases, no such claim or certification has been made.

[7] Subsection 27 provides for the exclusion of aliens "who the consular officer or Attorney General knows or has reason to believe seek to enter the United States * * * to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." 8 U.S.C. § 1182(a)(27).

[8] Of course, given such independent reasons, the government is not precluded from considering membership in a subsection 28 organization as one of a complex of factors the totality of which warrant exclusion.

> ernment may bypass that provision and proceed under subsection (27) only if the reason for the threat to the 'public interest[,] * * * welfare, safety, or security' is *independent of* the fact of membership in or affiliation with the proscribed organization. Only if such an independent reason exists will the use of subsection (27) leave intact the congressionally mandated restrictions on subsection (28).

Abourezk v. *Reagan*, 785 F.2d 1043, 1058 (D.C. Cir. 1986) (emphasis in the original). *Accord Allende* v. *Shultz*, 605 F. Supp. 1220 (D. Mass. 1985) (subsection 27 does not apply to aliens who are "directly encompassed" by subsection 28).

Nevertheless, the government contends that the executive branch may presume from an alien's membership in a subsection 28 organization that he is affiliated with a hostile foreign government, and then invoke subsection 27 to exclude him. This use of subsection 27 is inconsistent with Congress' intent in enacting the McGovern Amendment. Nino Pasti's membership in the World Peace Council, for example, is the ony fact specifically pertaining to him proffered by the executive branch as grounds for exclusion. *See* Affidavit of Lawrence S. Eagleburger, J.A. at 56; Affidavit of Lawrence S. Eagleburger, Pet. App. at 92a. Because the executive branch believed that the World Peace Council is a communist organization supported by the Soviet Union, it equated Pasti's membership in a subsection 28 organization with his representation of a foreign government.

Similarly, American citizens were denied the opportunity to exchange ideas with Olga Finlay and Leonor Rodriguez Lezcano when the executive branch barred their entry. Respondents invited these two Cuban women to meet with the members and staff of New York City's Commission on the Status of Women and to speak at a number of universities in order to share their expertise on day care and the role of women in Cuba. The execu-

tive branch concluded, however, that Finlay and Lezcano were traveling to the United States not as private citizens but as official representatives of the Cuban government and, therefore, were excludible under subsection 27. The court of appeals recognized in remanding these cases to the district court that the present record is ambiguous as to the facts upon which they were excluded. *See* 758 F.2d at 1060 n.23. To the extent that the executive branch has premised their exclusions on the mere fact of membership in the Federation of Cuban Women, an organization encompassed by subsection 28, it has "brand[ed]" these aliens with the "guilt by [political] association Congress sought to check [through the McGovern Amendment]." *Abourezk*, 785 F.2d at 1058.[9]

The effect of the McGovern Amendment would be entirely vitiated if, as the government contends (Pet. Br. at 26), the executive branch could premise the exclusion of an alien under subsection 27 upon the mere fact of his membership in a subsection 28 organization. The government's position in effect erects an irrebuttable presumption that such an alien necessarily would act as the agent of a hostile foreign government if admitted into the United States. According to the petitioner, this presumed agency affords the executive branch a reason

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[9] The executive branch's exclusion of Tomas Borge is of a different nature. Under Secretary Eagleburger identifies Borge as the Interior Minister of Nicaragua and explains how the admission of this official representative of the Nicaraguan government might harm United States' interests. In contrast to the other three cases of exclusion, Borge's representation of the Nicaraguan government is not inferred from the fact of his membership in a subsection 28 organization. *See* Pet. App. at 86a.

Nevertheless, the court of appeals has directed the district court on remand to resolve whether Borge's mere entry into the United States, as opposed to his prospective activities, furnishes sufficient grounds under subsection 27 to exclude him. The ABA takes no position as to whether an alien's mere entry could justify exclusion under subsection 27.

in addition to membership in a subsection 28 organization as a ground for exclusion. This reasoning overlooks the fact that, *but for* the alien's membership, the presumption that the alien is an agent of foreign government would not arise. The executive branch's reliance on this presumption as its "additional" ground, therefore, disregards the fact that the alien's membership in the subsection 28 organization still furnishes the only factual basis for exclusion.

The executive branch's interpretation of subsection 27 in these cases thus evades subsection 28 and the McGovern Amendment by inferring government representation from mere membership in a political organization. This interpretation erects rather than reduces barriers to the exchange of people and ideas that provoked the Helsinki Accords based on nothing more than the dubious but irrebuttable presumption that an alien's membership in a subsection 28 organization establishes him as an instrumentality of a hostile government. In these cases, the impact of these barriers has been to eviscerate the McGovern Amendment, selectively screening Americans from the insights, criticisms, and opinions of those who live outside the United States. The executive branch's interpretation of subsection 27 must be rejected to preserve the significance of both subsection 27 and the McGovern Amendment,[10] *see Weinberger* v. *Hynson, West-*

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[10] In his dissent below, Judge Bork theorizes that despite the executive branch's use of presumptions, the McGovern Amendment remains intact inasmuch as it still applies to the admission of members of communist groups that the State Department determines are not affiliated with foreign governments. 758 F.2d at 1072. In enacting the McGovern Amendment, however, Congress was aware that it would enable communist leaders affiliated with foreign governments to enter the country. *See* S. Rep. No. 194, 95th Cong., 1st Sess. 13, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1625, 1635 ("One effect of the [McGovern Amendment] would be to open the way to visits by Eurocommunist leaders and to Communist labor leaders without the executive branch having to make

cott & Dunning, Inc., 412 U.S. 609, 633 (1973), and to safeguard first amendment values.

D. The Government's Broad Reading of *Kleindienst* Is Unsupportable.

As an alternate argument, the government contends that *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), decided five years before the adoption of the McGovern Amendment, effectively immunizes the executive branch's exclusion decisions from judicial review. *Kleindienst* clearly recognizes that courts may not assess the wisdom or correctness of the executive branch's foreign policy conclusions arrived at in the exercise of its delegated authority over immigration. 408 U.S. at 770. But *Kleindienst* does not require courts to accept blindly the applicability of the Executive's proffered justifications for exclusion to the case before it. *Id.* at 769. This is especially clear when, as here, the Executive's proffered reason for exclusion conflicts with affirmative, statutory limits on the Executive's discretion to exclude.

In *Kleindienst*, American citizens challenged the Attorney General's subsection 28 exclusion of Ernest Mandel, a Belgian journalist who "advocate[d] the economic, governmental, and international doctrines of world communism." *Id.* at 756. The executive branch stated that it

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the politically difficult individual decisions which might imply a change in overall U.S. policy toward Communism"). The government's argument that a 1979 amendment to the McGovern Amendment indicates that aliens can be excluded simply because their organizations are somehow connected to foreign governments is equally unavailing. (Pet. Br. at 31). The amendment provides, *inter alia*, that the McGovern Amendment "does not apply with respect to representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state." 22 U.S.C. § 2691(b). The fact that this exception is carefully limited to representatives of government-controlled unions demonstrates that Congress did not intend to create a general exception for members of officially recognized or supported organizations.

had refused to waive Mandel's exclusion not on ideological grounds but because, on a prior trip, Mandel had exceeded the conditions of his visa by accepting more speaking engagements than his visa application reported and by appearing where contributions were solicited for political causes. *Id.* at 758-59. Thus, *Kleindienst* not only turned on different facts but also did not consider the impact of the McGovern Amendment.

Plaintiffs argued that the first amendment prohibited the Attorney General from denying a waiver to Mandel, urging the Court to review the Executive's exercise of discretion and to balance the government's interest in exclusion against plaintiffs' countervailing first amendment interests. The Court rejected these arguments and concluded that as long as the basis for exclusion is facially legitimate and bona fide, "the courts will neither look behind the [Executive's] exercise of * * * discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770.

Although the Court in *Kleindienst* held only that it would not review the Executive's exercise of discretion, the government interprets the case much more broadly to immunize its exclusion decisions from any effective judicial review. In so doing, petitioner ignores the critical fact that *Kleindienst* involved no express congressional limitation on the Executive's discretion to exclude aliens.[11] *See* 8 U.S.C. § 1182(d)(3) (aliens excludible

[11] The government invokes *Kleindienst* for the proposition that the executive branch possesses broad authority over the conduct of foreign affairs, and that the court of appeals' analysis improperly intrudes on this authority. Pet. Br. at 33-34. *Kleindienst* neither expands nor contracts the executive's power over the conduct of foreign affairs. The executive branch has no power to exclude aliens in a manner contrary to Congress' direction. Therefore, the court of appeals' requirement that the executive conform to Congress' delegation does not impose impermissibly on the conduct of foreign policy.

under subsection 28 could be admitted "in the discretion of the Attorney General * * *").

Kleindienst makes clear that the power to admit or exclude aliens belongs to Congress in the first instance and is delegated to the Executive. *Id.* at 76. In *Kleindienst*, the Executive acted within the authority delegated by Congress. Here, the executive branch exceeded its delegated authority by violating the McGovern Amendment's limits on executive discretion. The court of appeals, therefore, properly reversed the judgment of the district court and required the executive branch to show that its grounds for exclusion did not violate the McGovern Amendment. The court correctly reconciled subsection 27 with the McGovern Amendment by requiring the Executive to make an individualized determination, proffering bona fide reasons that are genuinely independent of membership in a political organization, demonstrating that the alien "seek[s] to enter * * * to engage in activities which would be prejudicial to" an interest protectible under subsection 27. 8 U.S.C. § 1182 (a) (27).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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No. 86-656

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, *et al.*,

Petitioners,

v.

JAMES ABOUREZK, *et al.*,

Respondents.

GEORGE P. SHULTZ, *et al.*,

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v.

CITY OF NEW YORK, *et al.*,

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GEORGE P. SHULTZ, *et al.*,

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v.

BRUCE CRONIN, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

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BRIEF OF AMICUS CURIAE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE*

The International Human Rights Law Group ("Law Group") is a District of Columbia nonprofit corporation organized to promote the observance of international human rights. The Law Group participates as *amicus curiae* in United States litigation involving international human rights and provides legal assistance to individuals and groups on a *pro bono* basis in cases brought in United States courts and international fora.

The 1975 Final Act of the Conference on Security and Cooperation in Europe (the "Helsinki Accords") contains a significant statement of international human rights norms, including standards concerning the free movement of individuals and the exchange of ideas and information without regard to national borders. The Law Group believes that these provisions of the Helsinki Accords are extremely relevant to the resolution of this case. In particular, the human rights norms enunciated in the Helsinki Accords cannot be ignored in determining the impact of the McGovern Amendment on the interpretation of Section 212(a)(27) and (28) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(27) and (28) (1982).

SUMMARY OF ARGUMENT

The McGovern Amendment constitutes a clear expression of Congressional intent that the United States implement the provisions of the Helsinki Accords with respect to the free movement of people, information, and ideas across national borders. Al-

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* Petitioners' and Respondents' written consents to the filing of this brief are on file with the Clerk.

though the McGovern Amendment applies most directly to subsection (28) of Section 212(a) of the Immigration and Nationality Act, the Amendment is also relevant in these cases, which the Petitioners considered under subsection (27). Since the Amendment is expressly designed to achieve greater United States compliance with the Helsinki Accords, the Accords themselves are also relevant to the judicial inquiry here.

In the cases before the Court, the denials of nonimmigrant visas to four aliens invited to meet and exchange opinions with United States citizens appear to violate United States commitments under the Helsinki Accords. The District Court failed to consider the Helsinki Accords in its analysis. The Court of Appeals' remand should therefore be affirmed so that the District Court can consider the Helsinki Accords in its analysis.

ARGUMENT

I. THE McGOVERN AMENDMENT CONSTITUTES A CLEAR EXPRESSION OF CONGRESSIONAL INTENT THAT THE UNITED STATES IMPLEMENT THE PROVISIONS OF THE HELSINKI ACCORDS WITH RESPECT TO THE FREE MOVEMENT OF PEOPLE, INFORMATION, AND IDEAS

The United States and thirty-four other nations, including the Soviet Union, signed an historic declaration of human rights norms in Helsinki, Finland on August 1, 1975. The declaration formed part of the Final Act of the Conference on Security and Cooperation in Europe (hereinafter the "Final Act" or the

"Helsinki Accords").[1] Among other things, the participating States undertook to promote the free flow of people, information, and ideas on an international basis. Each of the participating States resolved to "implement the provisions of the Final Act of the Conference in order to give full effect to its results."[2]

In 1977, Congress passed the McGovern Amendment[3] for the explicit purposes of "achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe" and "encouraging other signatory countries to comply with those provisions." The Amendment modified existing statutory provisions that were incompatible with the provisions of the Final Act concerning freedom of movement and the exchange of information and ideas across national borders.[4] Specifically, Section 212(a)(28) ("subsection (28)") of the Immigration and Nationality Act (the "INA"),[5] 8 U.S.C. § 1182(a)(28) (1982), accorded un-

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[1] Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, Dept. of State Pub. No. 8826 (Gen. For. Pol. Ser. 298), *reprinted in* 14 I.L.M. 1292 (1975) (hereinafter "Final Act" or "Helsinki Accords").

[2] *Id.* at 1324.

[3] Foreign Relations Authorization Act, Pub. L. 95-105, § 112, 91 Stat. 848 (1977) (codified as amended at 22 U.S.C. § 2691(a) (1982)).

[4] Congress also created the Commission on Security and Cooperation in Europe (the "Helsinki Commission") to monitor compliance with the Accords. 22 U.S.C. § 3001 *et seq.* (1982). One of the Commission's particular mandates is to encourage a "greater interchange of people and ideas between East and West." 22 U.S.C. § 3002.

[5] The Immigration and Nationality Act is also known as the McCarran-Walter Act.

fettered discretion to the Executive to deny nonimmigrant visas solely by reason of membership in, or affiliation with, a proscribed organization. The McGovern Amendment significantly limited this unfettered discretion, which is clearly incompatible with United States commitments under the Helsinki Accords, by providing that

> the Secretary of State should, within 30 days of receiving an application for a nonimmigrant visa by any alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such alien, unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States.[6]

The McGovern Amendment constitutes a clear statement of Congressional intent that the INA, and subsection (28) in particular, be administered in accordance with the human rights norms of the Final Act regarding the free flow of people, information, and ideas among nations.

II. PROPER RESOLUTION OF THIS CASE REQUIRES CONSIDERATION OF THE HELSINKI ACCORDS

Respondents argue that when interpreting 8 U.S.C. § 1182(a)(27) ("subsection (27)"), the statutory provision which Petitioners relied upon to deny nonim-

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[6] *Id.*

migrant visas in these cases, subsection (28) and the McGovern Amendment cannot be ignored.[7] The Law Group agrees. In addition, the Helsinki Accords cannot be ignored.

Subsection (27) makes persons who seek to enter the United States to engage in "activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States" ineligible for a nonimmigrant visa.[8] Subsection (28) makes persons affiliated with certain proscribed organizations ineligible for such visas, absent a waiver by the Attorney General.[9] The McGovern Amendment provides that the Secretary of State should recommend that the Attorney General grant the necessary waiver in order to achieve greater compliance with the Helsinki Accords.

The Court of Appeals noted that "[a] familiar canon of statutory construction cautions the court to avoid interpreting a statute in such a way as to make part of it meaningless."[10] Here, if subsection (27) is considered in isolation, the Executive will retain precisely the discretion that Congress limited in the McGovern Amendment, thereby rendering subsection (28) meaningless.[11]

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[7] For a detailed discussion of this issue, see Respondents' Brief at 33-40.

[8] 8 U.S.C. § 1182(a)(27) (1982).

[9] 8 U.S.C. § 1182(a)(28) (1982).

[10] *Abourezk v. Reagan*, 785 F.2d 1043, 1054 (D.C. Cir. 1986) (citing 2A N. Singer, *Sutherland Statutory Construction* § 46.06 (4th ed. 1984)); *see also Am. Textile Mfrs.' Inst. v. Donovan*, 452 U.S. 490 (1981); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

[11] Even though the McGovern Amendment does not expressly

A related principle of construction requires that each part of a statute be read as a part of the whole in order to produce a harmonious construction.[12] Subsection (27) and subsection (28), as limited by the McGovern Amendment, must, therefore, be read together to give each a meaning that is both separate from, and consistent with, the other. These meanings must, of course, also be consistent with the Congressional intent underlying each section. As the Court of Appeals noted, the proper construction of the subsections in question will "preserve the significance of both sections, *and the congressional intent that guided their adoption.*"[13]

There can hardly be a plainer expression of intent than that contained in the McGovern Amendment. The amendment was adopted explicitly "[f]or purposes of achieving greater United States compliance with the provisions of the Final Act."[14] This expression of intent was enacted into law. It forms part of the statute itself.[15] Any construction of the two sub-

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amend subsection (28), the Amendment is relevant to the construction of subsections (27) and (28), since it is without question a statute *in pari materia*. *See* 2A N. Singer, *Sutherland Statutory Construction* § 51.01 (4th ed. 1984). Such statutes should be construed together.

[12] *See* 2A N. Singer, *Sutherland Statutory Construction*, § 46.05 (4th ed. 1984).

[13] 785 F.2d 1043 at 1057 (emphasis supplied) (citing *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973).

[14] 22 U.S.C. § 2691(a) (1982).

[15] There is thus no need for recourse to legislative history to determine Congressional intent with respect to the McGovern Amendment. An analysis of the plain language of the Amendment is all that is required. Moreover, any attempt by the

sections that does not serve to bring the United States into greater compliance with the Helsinki Accords in the fashion envisioned by the Amendment robs a portion of the statute of its meaning and contravenes Congressional intent. It is thus necessary and proper for both the Executive and the courts, when construing subsection (27), to consider the Helsinki Accords and to determine whether the proposed interpretation will achieve greater U.S. compliance.[16]

On the record presented in these cases, it does not appear that the Executive gave any consideration to the particular relevance of the Final Act when it interpreted subsection (27). Furthermore, the District Court failed to examine the relationship of subsection (27) to subsection (28), as limited by the McGovern Amendment, and thus failed to consider the relevance of the Helsinki Accords.

III. THE VISA DENIALS IN THESE CASES APPEAR TO VIOLATE UNITED STATES COMMITMENTS UNDER THE HELSINKI ACCORDS TO PROMOTE THE FREE FLOW OF PEOPLE, INFORMATION, AND IDEAS ACROSS NATIONAL BORDERS, AND THIS ISSUE SHOULD BE EXAMINED ON REMAND

The Helsinki Accords establish specific standards for the promotion of the free flow of individuals, in-

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Petitioners to use administrative practice to overcome the express intent of the Amendment should be rejected. *See INS v. Cardoza-Fonseca*, 55 U.S.L.W. 4313, 4322 (U.S. March 9, 1987) (Scalia, J., concurring in the judgment).

[16] *Cf. id.* at 4317-18 (Stevens, J.) (definition of "refugee" under U.S. immigration law must be interpreted and applied consistently with United Nations Protocol Relating to the Status of Refugees, because there was clear Congressional intent to give it such meaning).

formation, and ideas across national borders. The United States appears to have violated these standards by denying visas to Tomas Borge, Nino Pasti, Olga Finlay, and Leonor Rodriguez Lezcano. This Court should affirm the decision of the Court of Appeals to remand so the District Court can consider the challenged visa denials in light of United States commitments under the Helsinki Accords.

The Conference on Security and Cooperation in Europe opened on July 3, 1973. Originally, it was to focus only on political and security issues. Under pressure from the Western countries, including the United States, the Conference expanded its agenda to include human rights issues.[17]

The commitments of the participating States pertaining to human rights are contained in the first and third sections (so-called "baskets") of the Final Act. Principle VII of Basket I establishes the general parameters of the signatories' commitments in the field of human rights. Basket III sets forth the more specific objectives in this area.

Principle VII of Basket I provides that the signatories "will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief."[18] It also specifically enjoins the participating States to act in conformity with the United Nations Charter, the Universal Declaration of Human Rights, the International Covenants on Hu-

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[17] *Fulfilling Our Promises: The United States and the Helsinki Final Act (A Status Report),* Commission on Security and Cooperation in Europe 256 (1979) (hereinafter *"Status Report of the Helsinki Commission"*).

[18] Final Act, *supra* note 1, at 1295.

man Rights, and other international declarations and agreements in the field of human rights and fundamental freedoms.[19]

Basket III reflects the specific agreement of the participating States to facilitate the movement of individuals, information, and ideas across national borders. The first section of Basket III promotes the free movement of individuals through commitments to reduce restrictions on personal and professional travel. The second section, which focuses on the free movement of information without regard to national borders, emphasizes in part the importance of exchanges of oral information at lectures, conferences, and international meetings. The third and fourth sections address the free movement of ideas by encouraging increased cultural and educational contacts and exchanges.

With respect to the freer flow of people, the participating States undertook to facilitate wider travel by individuals for personal or professional reasons by agreeing to "simplify and to administer flexibly the procedures for exit and entry."[20] In these cases, the United States has neither simplified nor flexibly administered its immigration procedures. Instead, it has engaged in a creative interpretation of its immigration laws to maintain the rigid procedures in effect prior to the Conference.

With regard to the freer and wider dissemination of information of all kinds, the signatories agreed to

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[19] *Id.*

[20] *Id.* at 1314.

> facilitate the dissemination of oral information through the encouragement of lectures and lecture tours by personalities and specialists from the other participating States, as well as exchanges of opinions at round table meetings, seminars, symposia, summer schools, congresses and other bilateral and multilateral meetings.[21]

Each of the aliens denied a visa in this case can argue that the United States has failed to fulfill this specific commitment. Each has specialized knowledge to impart, and each was invited to participate in the types of functions enumerated above.

Tomas Borge was invited to engage in a five-day speaking tour and also to meet with members of Congress, journalists, and university professors regarding his perspective on Central American affairs. As Interior Minister of Nicaragua, Mr. Borge certainly has expertise on that subject.

Nino Pasti, a former member of the Italian Senate, a former general in the Italian armed forces, and the current president of the Struggle for Peace organization, is a specialist on defense issues. He was invited to share his views with two organizations which are interested in United States nuclear weapons deployment policies.

Finally, Olga Finlay and Leonor Rodriguez Lezcano are two Cuban women who have special expertise on the status of women in Cuba. They were invited to speak at several universities and to address women's and religious organizations across the country. By de-

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[21] *Id.* at 1316.

nying visas to these individuals, the United States apparently violated its commitment under the Final Act to promote the types of exchanges described in section two of Basket III.

With respect to the expansion of contacts, the participating States agreed that

> [b]y way of further developing contacts among governmental institutions and non-governmental organizations and associations, including women's organizations, the participating States will facilitate the convening of meetings as well as travel by delegations, groups and individuals.[22]

Olga Finlay and Leonor Lezcano applied for nonimmigrant visas in order to address women's organizations. Representatives of both governmental and non-governmental organizations sought to develop contacts with Borge. The United States thwarted those aims and apparently failed to fulfill its Helsinki Accords commitments by denying visas to these individuals.[23]

Few issues concerning U.S. compliance with the Final Act have received more criticism from a broader range of sources at home and abroad than U.S. visa

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[22] *Id.* at 1315.

[23] Any failure by the United States to observe its commitments is doubly embarrassing since the United States has on numerous occasions urged other signatory countries to comply with the human rights provisions of the Final Act. See Carliner, *United States Compliance With the Helsinki Final Act: The Treatment of Aliens*, 13 Vand. J. Transnat'l L. 397, 408 (1980).

policies.[24] As Senator Mathias has pointed out, visa denials of the type involved here are

> very embarrassing to a nation which thrives on free speech and the marketplace of ideas.
>
> Barring individuals and groups from the United States solely because we do not like what they say or what they write represents a danger to our own values, a shroud of censorship on our own people and an unnecessary violation—singular as it is—of the letter and spirit of our obligations under the Helsinki Final Act.[25]

The Helsinki Accords provisions with respect to the free flow of individuals, information, and ideas across national borders are limited, as are all international norms governing a nation's immigration policies, by legitimate national security concerns. Petitioners have raised no such concerns in this case. Even if such concerns were raised, they should pose no obstacle to the fundamental requirement that the courts take the Helsinki Accords into account in applying subsection (27) and subsection (28), as limited by the McGovern Amendment, to individual cases.

CONCLUSION

For the foregoing reasons, the Law Group requests this Court to affirm the Court of Appeals' remand

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[24] *Status Report of the Helsinki Commission*, *supra* note 17, at 257-58.

[25] *Implementation of the Helsinki Accords: Hearing Before the Commission on Security and Cooperation in Europe*, 99th Cong., 2d Sess. at 59 (1986) (statement of Sen. Charles McC. Mathias, Jr.).

so that the District Court can consider the Helsinki Accords in its analysis.

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